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ABSTRACT

This issue of "Inequality in Education" comprises articles sampling perspectives of some attempts being made within the public school framework to gain a greater say in how and what children learn. The discussions are concentrated on efforts for (1) community control of Schools; (2) decentralization of school administration; and, (3) existing and potential voucher systems for public schools. In relation to community control, an overview of the development of parent and community participation and control in public schools, a movement termed "the emerging third force in education," is presented, and some existing examples of community controlled native American schools are analyzed. The decentralization program in the Los Angeles Unified School District is treated from contrasting points of view, as are the numerous ways in which the citizens and educators of Detroit have dealt with that city's critical public education problems. The pros and cons of four major voucher systems are summarized, and the workings of the voucher plan in the Alum Rock Union School District is explained. The potential viability of vouchers for public schools is also considered. A Center for Law and Education staff attorney presents a comprehensive analysis of cases dealing with students' rights to write and distribute literature. The concluding section is a special note on the legal challenges to educational testing practices. (RL)

INEQUALITY IN EDUCATION

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Acting Director: J. Harold Flannery

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Harvard Law School
Professor David Cohen,
Harvard Graduate School of Education

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Introduction

As the American public becomes increasingly aware of the inadequacies and inequities of the educational system in this country, parents and concerned community people are considering a variety of ways to secure quality education. A wide range of private schools is available as one alternative to public schools — for those who desire them and can afford them. The growing number of "alternative" schools is another manifestation of the attempt to have a more directly influential role in choosing how children will be educated. Along with these private (and sometimes costly) alternatives is a widening effort to make the *public schools* more responsive to and accountable for the kind and quality of education they offer.

This issue of *Inequality in Education* provides a sampling of perspectives of some attempts being made within the public school framework to gain a greater say in what and how children learn. The discussions are concentrated on efforts for (1) community control of schools, (2) decentralization of school administration and (3) existing and potential voucher systems for public schools.

Community Control. Don Davies presents an overview of the development of parent and community participation and control in public schools, a movement which he calls "The Emerging Third Force in Education." Daniel Rosenfelt analyzes some existing examples of community controlled Native American schools. In "A Black Perspective on Community Control," Kenneth Haskins argues that real and actual control of schools is the most viable way to make schools responsive to the particular needs of minority group students.

While recognizing the deeply rooted educational inadequacies and biases which have led to the demand for community control of schools, Leonard Strickman examines some constitutional and political problems which he finds in community control.

Decentralization. The articles by Jerry Halverson("L.A. Decentralization with Promise") and Kay Gurule and Joe Ortega ("L.A. Decentralization with Problems") discuss the decentralization program in the Los Angeles Unified School District from contrasting points of view. Luvern Cunningham describes the numerous ways in which the citizens and educators of Detroit have dealt with that city's critical public education problems, including its decentralization effort.

Vouchers. Thomas Flygare summarizes the pros and cons of four major voucher systems. The workings of the voucher plan in the Alum Rock Union School District is explained by Joel Levin. Finally, John Coons and Stephen Sugarman consider the potential viability of "Vouchers for Public Schools."

In the *Notes and Commentary* section, Center staff attorney Robert Pressman presents a comprehensive analysis of the cases which deal with students' rights to write and distribute literature. Paul Weckstein offers a special note (including a "Table of Cases") in "Legal Challenges to Educational Testing Practices."

Photo by Gail Levin

The Emerging Third Force in Education

by Don Davies

If there were a Dow Jones Index for the public schools it would be at an all-time low. Voices of criticism come from nearly all sides: the schools' publics are dissatisfied. Diagnoses of what is wrong and prescriptions for treatment differ widely. Nevertheless, there is little serious support for abandoning the public schools, and widespread agreement that profound reforms are needed in how and what children learn, as well as how schools are organized, governed, and financed. Largely because of two forces, reform is coming slowly despite a decade of foundation and federal support of innovation, and an avalanche of studies, reports, books, and plans: 1) *School systems*, particularly in the cities, have become increasingly bureaucratic, overly professionalized, and resistant to change; 2) *teachers' organizations* have acquired great new power and are usually a force against rather than for change.

One main hope for reform lies in the emerging third force of *parents and citizens*. The need for such a third force is supported by a simple argument. In a nation in which citizen participation and volunteerism have been dominant themes from its beginning, giving people more influence over institutions that affect their lives has positive psychological, social and political values. Meaningful citizen involvement in decision-making can strengthen confidence in and commitment to the school, while making schools more responsive to citizens' diverse concerns. Citizen influence in educational decision-making taps new ideas and energy, and provides leverage to bring about reform in improving the quality of services.

There is already a great upsurge of activity spurred by: the new consumerism; the Civil Rights movement and anti-poverty programs of the 1960's; the student movement; the widely publicized community control and decentralization controversies in New York City; a welter of national and state commission reports; state and federal legislative activity aimed at making the schools more accountable to the public; criticism by some politicians and social scientists of elitist, centralized institutional and governmental decision-making; efforts by some school boards and administrators to respond to crisis and criticism; the requirements of some federal education programs; and the reaction of many black and other minority leaders to the failure of school integration efforts in the northern cities.

Features of Change

As a result of these factors the amount of citizen participation in school affairs has increased rapidly in the past five years. The form, style and impact of participation varies widely.

Some of the features of change are easy to identify:

— Many large city school districts have adopted some form of administrative decentralization with varying degrees of community participation and delegation of authority to subdistricts or individual schools.

— Some districts, with or without decentralization, have created experimental community controlled schools or clusters of schools (Morgan School in Washington, D.C., which is

Until February 1973, Don Davies was Deputy Commissioner of Education for Development, U.S. Office of Education. He is currently a Fellow in Social Science, Institute for Social and Policy Studies at Yale University, and Director of the Institute for Responsive Education.

still a highly centralized district, is the best known example).

— There are thousands of new parent/citizen advisory committees for entire school districts as well as for clusters of schools, individual schools and for federally-sponsored programs within schools.

— A number of Indian tribes have initiated community control experiments in both public and Bureau of Indian Affairs schools on or near reservations, following the lead of the Navajos' Rough Rock School.

— There are hundreds of new "alternative schools," "Schools without Walls," "free schools," and "community schools" created largely by parent initiative, and operating inside and outside public school systems. Most of these include a substantial amount of parent/community involvement.

— Parents and other non-professional community residents are participating much more than ever before in school programs as tutors, volunteers in classrooms and libraries, monitors for lunch rooms and extra-curricular activities and special resource teachers (e.g., a craftsman from the community teaching pottery).

— In nearly every city there are several neighborhood citizens' organizations attempting to influence school policies and practices. Some examples are the Crenshaw Neighbors in Los Angeles, the Sunset-Parkside Education and Action Committee in San Francisco, United Concerned Parents of the Westside in Chicago and the United Bronx Parents in New York.

— There are a few citywide organizations devoting major attention to school reform and supporting either community control or increased citizen participation. The Public Education Association of New York City and the District of Columbia Citizens Committee for Better Public Education are the best examples. In addition, there are local Urban Coalitions and Urban Leagues working for greater citizen involvement in school affairs.

Despite these continuing developments, the third force of citizen participation in educational decision-making is still an underdeveloped field, both in theory and practice. The growing body of literature lacks a strong research base, tending toward emotion-laden advocacy or journalistic descriptions of "successes" and "failures."[1] The conditions led the writer to create the Institute for Responsive Education as a mechanism for studying and assisting the process of citizen participation in the schools. (Additional information about the Institute is provided on page 11).

If this third force in education is going to be more than proponent rhetoric or a means by which school systems placate dissatisfied clients, it must lead to a true redistribution of power between professionals and the public, between central school boards and individual schools. Permanent mechanisms are required through which citizens can both affect and participate in decisions about personnel, budgets and school programs. Internal mechanisms (e.g. school councils or neighborhood school boards) are needed for genuine decision-making participation on a sustained basis. Outside-the-school system mechanisms are needed to provide continuing oversight and external policy analysis, and a checking system to insure that internal decision-making mechanisms operate openly and effectively. Both are necessary and complementary for effective use of citizenry critic and participatory roles.

More power and influence for blacks, other minorities and the poor has been at the heart of the move toward urban school decentralization, the community control experiments and federal legislation and regulations requiring a participatory process. But, conceptually and politically the argument for more citizen participation and influence must extend to all people in the suburbs, small towns and rural areas as well.

The Local "School Council"

All the aspects and issues of citizen participation deserve extended examination and discussion, but the remaining comments here will focus on an already dominant participatory mode — the individual school council or neighborhood school board. The local school is the most significant testing place for the participatory process, because it is the most important unit in the change process in education. The school is the place where abstract rhetoric gets directly translated into practice. It is the place where federal, state, and municipal

decisions about budgets, policies, and programs take on real meaning. Participation has to be about *something*, and the participatory process has more impact when that *something* directly touches the daily lives of those who are involved. None of these comments should be taken as minimizing the impact of forces beyond the individual school and its immediate community, or as advocating that citizen participation should be limited only to the most local level and concerns. The point is that participation should devolve power to the citizenry and should increase the quality of services. To have these results, the process must begin — but not end — with the local school.

Since 1968 a dozen or more large city school districts and scattered small town and suburban districts have encouraged or mandated the establishment of school councils (known by a wide assortment of names, with various combinations of the words "parents," "citizens," "community," "schools," "advisory," "policy," "committee," "council" and "board"). "School council" is used in this article to refer to the various groups. No one knows how many exist, but the number is in the thousands (there are 1,200 in Chicago and Los Angeles alone).

Very little information and almost no research or evaluation about school councils has been assembled or analyzed nationally. I have conducted a brief inquiry: field visits to a few cities including Chicago, Los Angeles, and Louisville; site visits to several Office of Education projects where citizen participation through a local council is required; reading, and talking to knowledgeable people.

The majority of most school council members are parents of children in the school, but also include other community representatives, some teachers, and, in the case of secondary schools, a small number of non-district parents. The principal usually serves as an exofficio member. Most councils are elected either at a community meeting or in a special secret-ballot election held at the school. Some are appointed by a school official or the central board. Some include both elected and appointed members and official representatives of the teachers union and the PTA. The size of membership seems to vary widely, from very small (five or six) to very large, 100 or more. Although it is unclear how representative the groups are on criteria such as age, race, sex, occupation, income, and political ideology, it is certain that councils are more representative than the central boards of education in the same districts.

The conceptual basis of the school council idea varies widely. In some cases, the plan seems a progeny of the citizens' advisory committee movement which mushroomed in the heyday of the National Citizens Council for Better Schools in the 1950's. The local advisory committees were close allies of the administrators and the school district board in their efforts to achieve more public support for increased budgets. They were usually appointed by the superintendent or the Board of Education, elitist in nature, and often had a life of a year or two. These groups were almost always district-wide and *strictly advisory;* some, however, had substantial influence.

In other cases, school councils seem to be a close kin of the PTA, sometimes representing only a renaming of the existing PTA or dominated by the existing PTA leadership. Conceptually this version of a school council exists largely to "support the school:" raising money, sponsoring social activities, providing for two-way communication with the community. This approach means little or no decision-making authority. It is important to note that the PTA (both local school units and citywide PTA councils) have generally opposed the development of school councils which involve any real sharing of power with citizens. Fearing involvement with neighborhood politics and power-struggles, PTA's also tend to be resistant to groups that include community residents other than parents of children currently in the school.

Still another conceptual forerunner of some school councils is the parent advisory committee established through a specific federally-funded education program such as ESEA Title I. Some councils have simply been built on existing advisory committees. Others operate side-by-side with the federally-generated groups, sometimes cooperating, sometimes competing. Councils of this ilk tend to be representative of the immediate client group (e.g. parents of poor children) and limited to an advisory role. Often, however, they can exert

considerable influence because of strong ties to influential people and groups in the neighborhood.

In a few instances (Detroit, Chicago, and Los Angeles, for example) school councils were established as a supplement to an administrative decentralization plan. In Detroit, the local councils relate to the new zone school boards. In Chicago, there are two intermediate layers between the school councils and the central office, a district council composed of representatives of the local groups and an advisory committee to each of the three area superintendents. Decentralization plans to date tend to devolve little power from the central board or office, but they do provide a new kind of framework for citizen activity in which decentralized influence can develop.

In other cities school councils are viewed, conceptually and politically, as a substitute for decentralization. The results can be either very weak advisory mechanisms or the beginnings of significant citizen decision-making about personnel, budget and programs.

There are few present examples of school councils that could be considered a part of the "community control" model which involves an almost total transfer of power from the central board to an individual school board. However, there are some districts intending to move gradually toward neighborhood school boards having a wide range of delegated decision-making authority (e.g., Louisville). Other examples exist where "alternative schools" have been set up either in or out of the school system with a strong parent/citizen governing board.

As in Chicago, Los Angeles, and Louisville, most of the models suggested above exist side by side in the same city. This probably means that the mandate from the central authorities encourages such diversity or is so weak or ambiguous that such diversity is inevitable.

Another way to view varying conceptual bases for school councils is to apply a simple three-part model. The model can be applied to all groups belonging to the general class of

Photo by Ed Pacheco

citizen-dominated local organizations which relate to a single institution, service, or program (e.g., school, hospital, mental health center). The three types are: 1) governing boards which have legally-sanctioned authority over personnel, budget and program; 2) advisory committees, which are just that, advisory; 3) groups with some decision-making authority, limited to specific areas of decision-making. Applying this model to school councils, almost none fit category one, most fit category two, and a few fall in category three.

School board statements and policies about functions and authority of school councils have certain predictable characteristics. All extol participation and the importance of good school-community relations. Most emphasize the advisory role of the councils, making clear the specific authority of the principal the superintendent, the Board and the specific limitations of state laws and regulations. Most emphasize two-way communication. Some talk about shared decision-making, while strongly eschewing "community control."

It is my impression that the connection between stated roles and actual practice is weak. Many councils, which seem on paper to have considerable power, are in practice tightly controlled by the school principal. Other councils, with weak paper mandates, have developed considerable power and influence. I observed a situation where one council, operating under a weak, advisory-only charter, in fact: removed a principal deemed incompetent by the community, selected his replacement, vetoed a proposed building site, successfully pressed for a new individualized reading program, and obtained increased funding from the central board. This council has aggressive leadership and a strong base in the community. It simply began to exercise decision-making authority *de facto*.

Potential Power

Until the survey to be conducted by the Institute for Responsive Education this winter and spring is completed, it is not possible to safely generalize about the roles existing councils play. It is possible to suggest the decision-making areas they might be involved in, with degree of involvement ranging from information and advice to major influence or actual decision-making power. Such areas would include:

School Objectives: identifying educational needs; determining goals, objectives, priorities; monitoring and assessing progress toward achievement of goals.

Personnel (principal, teachers, other staff): defining qualifications (within state law); reviewing candidates; selecting; evaluating performance; deciding about tenure, reassignment, removal; determining personnel policies; planning and conducting staff orientation and training; negotiating with employee organizations.

Budget: identifying resource needs of school; setting budget priorities; reviewing and adopting budget; monitoring use of funds.

School Program (curriculum, extra-curriculum, student services): planning and developing new or revised programs; preparing and approving proposals for special projects; monitoring and evaluating programs; determining program priorities; approving participation in research projects.

Facilities: establishing priorities for rehabilitation, equipment; selecting building sites; planning for new or remodeled buildings.

School-Community Relations: identifying community needs; explaining school policy programs; securing support and/or services from parents, students, teachers, community residents; serving as ombudsman for individual students, or parents; planning and conducting orientation and training activities for parents and community; sponsoring social activities; raising money for the school.

It is important to note that the degree to which a council can be meaningfully involved in these areas depends, among other things, on how much and what kind of decision-making is delegated from the central board to the local school. For example, unless there is lump-sum, school-by-school budgeting, the local council can have little influence in the budget. If the district requires principals to be selected only from a central list and in order of seniority and/or test scores, the local council can have little to say about choosing a principal.

Of all of the areas of possible responsibility, personnel is the most controversial and emotion-charged. Administrators are almost uniformly opposed to giving a citizen group the power to select, evaluate or remove a principal. In Chicago, the school councils have the authority to interview candidates (from a citywide list of qualified candidates), review their qualifications, and make a recommendation to the district. In practice, the recommendations of a council are seldom overruled. In Los Angeles, where school councils are not given any authority over personnel selection, a few have had a strong hand in either removing an incumbent or selecting a new principal.

Few, if any, councils have authority over selecting or evaluating teachers. Teacher organizations are almost always strongly opposed to giving lay people such a role and often attempt to proscribe it in contracts negotiated with the board. Yet, clearly wherever there is an active council, they want to have an increased voice in teacher selection. Conflict on this point is inevitable.

School councils have been created for a variety of reasons. Some programs have developed because of the strong interest and initiative of the superintendent or one or more members of the Board of Education, some because of grass-roots pressure. Others are simply a reflection that citizen participation has become a currently popular, much discussed "in" thing.

In most cases the board creates the councils and provides little, if any, specific encouragement, budget support, or other kinds of direct assistance. One important exception is Louisville, where a community relations office headed by an Assistant Superintendent-level person works with and helps to strengthen that city's neighborhood school boards. Los Angeles, with the help of a Rockefeller Foundation grant, provides some central office assistance in the form of a consultant, newsletters, and an annual survey. But "sink or swim" is the more usual mode. This situation leads many to question the motivations behind the program; and some dismiss the entire enterprise as just another gimmick to placate the community.

How well are the councils really working? Most people in most cities think that they are not working well at all. School officials blame the inadequacy of the program on two things. The most important is apathy. "Only a handful of people are willing to spend any time." "The people really don't care." "People are too busy with their own private concerns," and so on. Of course, it doesn't take extensive sociological research to know that apathy is sometimes the self-fulfilling prophecy of professionals or sometimes cynicism or fear of would-be citizen participants who sense that they are not really welcome partners in the school decision-making process.

The Principal Problem

The second problem most commonly cited by school systems is fear or opposition by the principal. The principal, most threatened and affected by school councils, feels caught in the middle, often doesn't have much real status or authority in the district's administrative hierarchy, and is seldom involved in making the decision to have school councils in the first place. Even quick and superficial observation makes it clear that the principal is, in fact, a key to make or break a school council.

The view of council chairmen, members and others in the community tends to confirm the belief that the principal is often the chief reason for council ineffectiveness. Other commonly cited reasons for the program "not working" are lack of support or interest by the system (meaning the Board of Education, the Superintendent, and other influential members of the central office leadership), opposition by the teachers organization, and lack of training and help so that council members can learn to be effective.

Even though the overall assessment of councils is quite negative, there is wide agreement that the idea has promise and that steps should be taken to:

1. provide the councils with some operating funds;
2. provide systematic and continuing orientation and training for chairmen and members;
3. provide systematic training for the principal and the teachers, along with the council, to develop more professional-citizen communication and understanding to decrease fear and threat on both sides;

4. give the councils real authority in at least some areas of decision-making.

I agree that the school council has promise. However, it could do more harm than good if it becomes another exercise in futility. Unless the councils can move toward a real share in decision-making authority they are likely to increase alienation, cynicism and unrest, and consequently decrease parent and community involvement in the school.

The most likely way for councils to gain a real share of power is to press for it directly, allying themselves with community or outside-the-system organizations dedicated to giving the community a larger voice in decision-making. Some of the most effective councils are those in low income areas strongly supported by a neighborhood organization. Thus we return to an early contention that the best strategy for effective citizen participation is one which combines inside and outside mechanisms.

It may seem conventional to say that "more research is needed." But surely it is. The school council concept must be sorted out more clearly. Four or five of the most promising models need to be identified. Then these models need to be studied intensively for a period of time to document the process in each and trace results of impact on a whole range of factors. These include pupil achievement and attitudes; teacher attitudes, morale and effectiveness; parent and citizen attitudes, and behavior; the political and organizational dynamics of the community.

Through this kind of case study research and through more theoretical policy studies, the issues underlying the citizen participation phenomena can be addressed and value conflicts clarified as a guide to policy making.

School councils are one significant promising facet of the broader development of a third force of parents and citizens, and as such, requires the thoughtful attention of all who are concerned about both school reform and the participatory process.

About the Institute for Responsive Education

The Institute for Responsive Education was created to study and assist the process of citizen participation in education. It is a non-profit, tax exempt organization presently housed in the Institution for Social and Policy Studies, Center for the Study of Education, Yale University.

IRE will begin its activities this fall. It has laid out a six year program which it hopes will contribute to the following results:

1. Identification and assessment of alternative models for effective citizen participation in solving school problems.

Photo by Deborah Feingold

2. Increased citizen interest and voluntary activity in public schools (both participation in decision-making and involvement in school programs).
3. Development of a cadre of trained, motivated leaders for paid and voluntary service to citizen efforts in education.
4. Development and widespread use of tested procedures for citizen participation in education (including training, technical assistance, dissemination, research, and evaluation models).
5. Changes in local, state, federal laws, codes, guidelines to encourage and support citizen participation in education.
6. Increased interest and research by scholars in the social sciences, law, education and other fields related to citizen participation in education.
7. Establishment of new citizens' organizations for public education in several cities and suburban and rural communities (or strengthening of present organizations where they exist).
8. Creation of a network of communications and mutual assistance among local organizations.
9. Increased interest, activity and financial support in the improvement of public school effectiveness by large national corporations and by national organizations such as the Urban League, Urban Coalition, League of Women Voters and the Chamber of Commerce.
10. Increased understanding and support by teachers and education officials at all levels for active citizen participation in educational decision-making.
11. Increased channeling of the resources and talents of corporations to citizen-led efforts to reform the public schools.

The plans of the Institute include preparing an extensive annotated bibliography on citizen participation which is scheduled for publication by the Center for the Study of Education in November. The second activity is a comprehensive national survey of current programs and practices which will be conducted in the winter and spring, with the report scheduled for September 1974. The survey will be conducted by personal interview in 100 of the largest districts and by mail questionnaire in another 7,000 districts with more than 1,000 students enrolled. It will attempt to determine the location, characteristics and roles of outside-the-system citizens' groups working for school improvement and inside-the-system participatory mechanisms such as school advisory councils and neighborhood school boards.

It also plans to undertake 1) a program to encourage better utilization of corporate resources for school reform, 2) case study research on various models of participation, 3) technical assistance to local groups, 4) program evaluation, 5) training leadership personnel for citizens' organizations and school district participation programs, and 6) consciousness-raising and informational activities such as publications and conferences.

The Institute is an advocate for the process of citizen participation but does not promote a single model or approach. It is an advocate of school reform but does not promote any particular approach for organizing, administering or teaching.

The Institute wants to know about and cooperate with individuals and groups interested and involved in participatory endeavors. It seeks help in identifying people, places, projects, and invites correspondence. Address inquiries and information and materials to Don Davies, Institute for Responsive Education, Center for the Study of Education, Yale University, 70 Sachem Street, New Haven, Connecticut 06520.

Footnote

[1]There are some important exceptions. The published work of Marilyn Gittell of the Queens College Institute for Community Studies is extensive and helpful. See for example: Marilyn Gittell, *Participants and Participation:* New York, Praeger, 1966; Marilyn Gittell and T. Edward Hollander, *Six Urban School Districts: A Comparative Study of Institutional Response:* New York, Praeger, 1968; and Mario Fantini, Marilyn Gittell and Richard Magat, *Community Control and the Urban School:* New York, Praeger, 1968. Also of special significance are two new books: George R. LaNoue and Bruce L.R. Smith, *The Politics of Urban School Decentralization:* Lexington, Mass., Lexington Books, D.C. Heath and Co., 1973 and Joseph M. Cronin, *The Control of Urban Schools:* New York, Free Press, 1973.

The Renaissance of Indian Education

by Daniel M. Rosenfelt

In most Indian communities today, people are demanding community control of education. This position has substantial support. In 1969, the Special Senate Subcommittee on Indian Education, after more than two years of intensive study, recommended that the United States set as a national goal the achievement of: "[m]aximum Indian participation in the development of exemplary educational programs for (a) Federal Indian schools; (b) public schools with Indian populations; and (c) model schools to meet both social and educational goals . . . ."[1] The following year, President Nixon declared, "[W]e believe every Indian community wishing to do so should be able to control its own Indian schools."[2]

Approximately 250,000 Indian, Eskimo and Aleut children now attend this nation's public, federal and private schools.[3] Roughly 70 percent of these students attend public schools, 25 percent attend federal schools operated by the Bureau of Indian Affairs (BIA) and 5 percent attend religious or other schools.[4]

The education of Indian children receives substantial federal financial support. In fiscal year 1972 the BIA spent almost $3,000 per pupil for its 52,000 students (36,000 boarding and 16,000 day), while the federal government provided about $700 for each Indian student to supplement state and local expenditures in the state public schools.[5] This nearly doubles the nationwide average per-pupil expenditures in public schools of $858.[6]

The purpose of this article is to discuss the . . . practical considerations which face Indian communities as they begin to move toward transforming the rhetoric of "Indian control" into the reality of quality education.

Need for Increased Indian Control

The inadequacy of the present system of formal Indian education in both public and federal schools is suggested by the following statistics compiled by the Senate Subcommittee: (1) dropout rates for Indians are twice the national average; (2) more than 20 percent of Indian men have less than 5 years of schooling; (3) 40,000 Navajo Indians, nearly a third of the entire tribe, are functional illiterates in English; and (4) only 18 percent of the students in federal Indian schools go on to college (the national average is 32 percent).[7]

A review of the testimony of Indian leaders in hearings held by the Senate Subcommittee and by other congressional committees reveals a strong consensus that the single most important reason for this deplorable condition in both public and federal schools has been the exclusion of Indian parents and community members from participation in, and influence or control over, the kind of education which their children receive.[8] Most Indian children are taught by persons from a foreign culture with foreign values who speak a foreign language. Other factors are also operating to

Daniel M. Rosenfelt, formerly a senior staff attorney at the Center for Law and Education, is currently Associate Professor at Gonzaga Law School.

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make many Indian children uncomfortable in white schools. These factors include the historical fact that Indian people have been treated by non-Indians as inferior, that non-Indians have usurped Indian lands, and that non-Indians control all important private and public organizations.

After almost 200 years of a federal "civilization" policy, one-half to two-thirds of Indian children enter school with little or no skill in the English language,[9] and only a handful of teachers and administrators speak Indian languages.[10] Even where language itself is not a barrier, very few federal or public school teachers fully understand and share the values of their Indian students.[11] At school, the curriculums, textbooks, and educational philosophy are designed to instill values such as competitiveness and individual self-aggrandizement which are alien to Native American cultures.[12] In short the present education system is simply not equipped to cope with the cultural and linguistic disparities presented by Indian students.

Today there is a rapidly growing awareness in Indian communities that a bilingual/bicultural education built upon Indian values and Indian traditions presents a viable alternative to present forms of instruction. There is no intrinsic reason why education must take place in a foreign language and instill foreign values. Indian parents, however, must play an active role in reshaping the schools if they are to become more relevant to the needs of Indian children. Fortunately, the importance of education is becoming increasingly apparent to Indian people eager to escape poverty or hoping to join the force of skilled and professional workers in the economic development of their reservations. In this regard, Indian parents and community members are taking a new look at the educational institutions which purport to serve their children.

The call for "Indian community control of Indian education" has struck a responsive chord among Indian communities. Reports of the exciting experiment at the Rough Rock Demonstration School in Arizona contrast sharply with the blanket condemnations of existing public and federal programs, and are now leading many Indian communities to adopt new approaches to education.

Examples of Indian community control within the federal system include the Rough Rock, Ramah, Busby, and Chemawa Schools; models of Indian control within state public school systems are represented by Rocky Boy and Hoonah City. In some communities, control of the entire school system may not be feasible or desirable. Indian control of less than an entire school system may be achieved through the administration of Johnson-O'Malley contracts or through parent advisory committees under Title I of the Elementary and Secondary Education Act of 1965,[13] JOM, or the new Indian Education Act of 1972.[14]

At the outset, it is necessary to note that "Indian control" and "community control" are not always identical. For example, the Navajo Indian Reservation, spanning parts of Arizona, New Mexico and Utah, with an area roughly equivalent to that of West Virginia, encompasses several distinct communities. The Reservation is governed by an elected tribal council, but the acts of the tribal council, or the tribal officers, may not always be in harmony with the wishes of a particular community. This, of course, is simply an incident of representative government. On some of the smallest reservations, the tribal council consists essentially of all the adults in the village, and, for all practical purposes the council is the community. Inter-tribal, regional, and national organizations each play important roles in the contemporary Indian education scene, but the focus here is on the individual community.

Federal Schools
Rough Rock Demonstration School

The oldest and perhaps best known of the new Indian schools is the Rough Rock Demonstration School. Located near the geographical center of the Navajo Reservation in Arizona,[15] Rough Rock is supported by funds from the BIA and the Office of Economic Opportunity, and by private grants. Founded in 1966 as a private, nonprofit corporation by three Navajo educators with assistance and encouragement from OEO and BIA, the school emphasizes Navajo bilingual education, cultural identification, school-community relations, adult education, and con-

trol of policy decisions by the local all-Navajo school board. The Rough Rock School started with a new $3,000,000 facility turned over by the BIA together with $307,000 of BIA funds which the Bureau would have spent to operate the school. In addition, OEO granted $329,000 in 1966 for intensive experimentation with innovative programs. Perhaps most important, Rough Rock did not inherit an entrenched bureaucracy; instead it was free to recruit a fresh staff of interested and dedicated persons – both Navajo and Anglo. By all accounts, the Rough Rock Demonstration is a great success: students are eager to come to school and stay there; the teachers and administrators are enthusiastic.[16]

Without denigrating the project at Rough Rock and the enthusiastic participation by community people in the school, it is necessary to point out that Rough Rock has flourished under unique conditions. First, the demonstration was conceived not by members of the Rough Rock community but by outsiders, both Navajo and Anglo. In addition, it has received generous financial support from many sources. Even more important, the school has attracted extraordinarily talented personnel and consultants, both Navajo and Anglo, from outside the community.[17] Moreover, the school is maintained as somewhat of a showcase for touring bureaucrats, educators, and journalists. Indeed, in its first 22 months of operation, this remote boarding school serving 317 children attracted 15,000 visitors![18]

The Rough Rock School has shown that an educational experience which involves the entire community and which incorporates the positive elements of Indian life and culture can succeed with substantial outside support. Because Rough Rock is a "demonstration," it is unlikely that the BIA, OEO and other agencies will commit equivalent resources to many other communities. Accordingly, while many of the educational theories developed at Rough Rock can be adapted for use in other types of schools, those who wish to emulate Rough Rock must carefully assess the extent to which necessary financial and human resources will be available.

Ramah Navajo High School

The second of the modern Indian-controlled schools was established at the Ramah Navajo community in New Mexico in 1969. Ramah High School had been operated as part of the public school system of the Gallup-McKinley school district until 1968, when the county school board closed the school as an economy measure.[19] Ramah Navajos were left with the choice of attending either distant federal boarding schools or the consolidated high school 20 to 30 miles away. The latter alternative became unfeasible when the Gallup-McKinley school district decided that it would be unable to provide transportation for Indian children. The subsequent failure of a suit which sought to reopen the Ramah High School[20] left Ramah citizens with the prospect of sending their children to the distant federal boarding schools.[21] At this point, some members of the community, with the assistance of legal services attorneys, decided to establish their own high school.

In February 1970, the community elected and incorporated a private school board which, with the aid of a small interim grant from the Anne Maytag Shaker Foundation of New York and additional legal assistance from the Robert F. Kennedy Memorial, secured a commitment from the Commissioner of Indian Affairs to provide the school board with funds equivalent to what it would have cost the BIA to educate Ramah students in federal boarding schools. The $368,068 provided by this formula was enough to allow the community to operate a private school for grades 7 to 12.[22]

The Ramah contract formula, based on the sum which the BIA would have spent to educate the Indian children in federal schools, could easily be applied to other Indian communities. There are several built-in limitations, however, which require careful consideration. First, since the formula does not include money for construction, or even renovation, there must be an adequate physical plant available at a reasonable cost.[23] Second, the funding level does not allow for the development of new, experimental, or innovative programs, although the community is free to seek outside funding to supplement the basic budget. Finally, under present BIA regulations not all Indian children are entitled to attend federal schools or, presumably, to receive funds under the Ramah formula. To attend a BIA day school, a child

must be of at least one-fourth Indian blood and reside on an Indian reservation or allotment.[24] To attend boarding school, it is further required that no other appropriate school facilities be available or the child must come from a broken or unsuitable home.[25] The Secretary of the Interior has some discretion to waive these requirements,[26] but unless Congress or the BIA is prepared to modify its policy of looking to the states to provide for educational services,[27] there will be many Indian communities ineligible to adopt the Ramah plan.

Busby School

The Busby School on the Northern Cheyenne Reservation in Montana was, until recently, a traditional BIA boarding and day school serving 98 boarders and 223 elementary and secondary day students.[28] In its more than 50 years of existence, no graduate of Busby was known to have completed college. Consultants to the Senate Subcommittee reported to Senator Edward M. Kennedy that "[t]he Busby School, both day and boarding students, seems to be operating as a custodial institution."[29] Further, the school was reputed to have an unusually high suicide attempt rate.[30]

The initial step in the movement for local control at Busby was to attempt to bridge the barriers between the community and the school. This effort was aided by the parent participation requirements of Title I, and a "Parental Involvement Program in Education" project funded by the Donner Foundation of New York. Gradually, a consensus formed among the community that it, rather than the BIA, should operate the Busby School. The BIA, in turn, seemed eager to relinquish control of the school.[31] In July 1972, an elected Busby School Board assumed control of the school under a $795,000 contract.

The arrangement for Indian community control of Busby differs from the Rough Rock and Ramah experiences in several respects. First, unlike Rough Rock and Ramah, where the local communities formed private corporations to deal directly with the BIA, the parties to the Busby contract are the BIA and the Northern Cheyenne Tribal Council. Although relations between the Tribal Council and the community are excellent at present, the possibility of future difficulties should not be ignored. The Northern Cheyenne Reservation encompasses several other communities, and the Council may not always reflect the interests of the Busby community alone.

A second major difference is that the Busby School inherited an existing staff, whose members retained their civil service status.[32] In some ways the community was limited in this regard, for many of the nonprofessional staff are tribal members whose desire to retain civil service benefits was stated clearly. In addition, the non-Indian teachers and administrators could have fomented further bad feeling. The Busby School, because of its inherited staff, may move more slowly in the direction of educational reform, a style which seems to suit the relatively conservative Busby community. Stability is the great advantage to the Busby model. As the school board members begin to assume their responsibilities, they may be aided by experienced personnel in coping with any crises which might arise. New staff members can be brought in gradually as many of the existing staff members either retire or transfer.

Chemawa Indian School

During the last three years the BIA has responded to the Indian movement for control of education by establishing parent "Advisory School Boards" for each of the federal schools. While the establishment of a recognized board which enables parents to visit the school is itself a major innovation, so far the advisory boards have not had a major impact. In the case of the off-reservation boarding schools, the problem of distance makes it difficult for the board to meet more than two or three times a year.

The Chemawa Indian School near Salem, Oregon, has developed a procedure which may help overcome the barrier of physical distance between parents and the school. Chemawa serves 859 students from Alaska, Montana, Idaho, Washington and Oregon. In the fall of 1971, the BIA entered into a $25,000 contract with the Advisory School Board which enabled the Board to hire its own Executive Secretary to act as a full-time liaison between the Board and the school. The Executive Secretary is given office space at the school, and also spends considerable time traveling to meet with Board

members in their home areas. These procedures are based on the hope that communication will be increased in two ways: the Executive Secretary disseminates news from the school; and he also acts as the advocate for the Advisory Board at school in the absence of Board members.[33]

BIA advisory school boards may make suggestions and recommendations, and, as a practical matter, have the power to remove the school superintendent.[34] Aside from this ultimate power, however, the advisory boards cannot be said to have meaningful "control." While it does not play a decisive role in determining curriculum, selecting personnel or evaluating academic standards, the Chemawa Board does set out general guidelines for the Superintendent to follow, and Board members, selected to represent different geographical areas, act as ombudsmen for the parents and students from their home areas.

The cost of the Advisory School Board with its Executive Secretary is substantial, but if board members and the Executive Secretary are conscientious and competent, the benefits to the overall school program will easily justify the cost. The Chemawa model seems well adapted to other BIA schools. A board could surely be more effective where the distance between the parents and school can be measured in tens of miles rather than thousands.

Public Schools

Many Indian people have been reluctant to exercise their right to vote for members of public school boards because of fear that it will lead to the termination of their special status as wards of the United States and open the way to state taxation of their land.[35] As more Indian children attend public schools, however, their parents have seen that they must vote in order to have a significant influence over local educational policy. Predominantly Indian communities can control public school boards through the ballot box. There are 78 public school districts in the country with predominantly Indian school boards.[36] These elected school boards have power to hire and fire school personnel, develop curriculum (consistent with state requirements),[37] negotiate contracts, and organize or reorganize the manner in which the district is operated. Indian controlled boards can bring in Indian administrators, Indian teachers, and Indian personnel, and can insist upon the development of a curriculum relevant to Indian needs. Even where Indians are not in the majority, it is still possible to bring about change through coalitions with other minority groups. For many communities this is the easiest and most direct path to making public schools responsive to Indian needs.

This tactic may be most successful in small districts where the Indian community can have an excellent opportunity to influence the operation of the schools. Such is the case in Hoonah, Alaska.[38] In some instances, however, districts may be so large that meaningful "community control" cannot be easily exercised. The Indian controlled Gallup-McKinley district in New Mexico, for example, serves more than 7,000 Navajo and Zuñi children from communities scattered over thousands of square miles. The Navajos on the school board cannot represent any single community and, accordingly, Indian control of the school board does not necessarily assure community control.

Indian control of school boards may similarly be achieved by realigning school district boundaries to insure that large Indian communities control their own districts. This technique has succeeded in the Rocky Boy Public School District in Montana.[39] The principal problems inherent in this device . . . include the precarious nature of a "community school" which is absolutely dependent on federal and state financial assistance,[40] the question of the deliberate creation of a racially imbalanced public school district,[41] the obstacles to the formation of new districts presented by state education codes,[42] and the imposition of state educational requirements upon the Indian community.[43]

Control of Federal Programs in Public Schools

It may not be necessary to take control of a school in order to exercise substantial power over the educational program. Many of the programs of federal assistance to public schools have requirements for community participation which, if exercised, will make a difference. Often such federal funds constitute the major portion of the school budget

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Johnson-O'Malley Contracts

The Johnson-O'Malley program is designed primarily to provide supplemental aid to meet the special educational needs of Indian children in the public schools.[44] To discharge this function, the BIA may contract with "any appropriate State or private corporation, agency, or institution."[45] Until 1971, the BIA invariably contracted with the state departments of education, but recently there has been an increasing tendency to find Indian tribal groups "appropriate." Thus, contracts have already been made with the United Tribes of South Dakota, the United Tribes of North Dakota, the All-Indian Pueblo Council, the Nebraska Inter-Tribal Development Corporation, and the Omaha Indian Tribe. The contractors have in turn chosen to subcontract with public school districts.

Through the administration of a Johnson-O'Malley program, a community can control a significant segment of the educational program in the public schools. The Omaha Tribe, for example, occupies a small reservation in Macy, Nebraska. Through a $215,000 contract with the BIA, the tribal education committee was able to establish an Indian culture and language program in the public school. In addition, JOM funds were used to hire Indian teacher aides and to reimburse Indian parents for out-of-pocket charges imposed by the school.

There is no reason why contracting should be restricted to Indian inter-tribal organizations or tribal councils. The BIA, or one of the inter-tribal groups, could contract directly with a community Indian education committee. The committee could then contract with a public school or adminster its own program.

Some of the items which can be included in a Johnson-O'Malley program are: special language classes, extracurricular travel, athletic equipment, clothing, and additional teacher aides or home-school coordinators. In addition, there are a number of important indirect benefits which may result from having Indian tribes or communities administer JOM con-

tracts. The responsibility for administering the contract will help give some Indian people valuable experience which they would not otherwise receive. It may, moreover, provide a means by which the Indian community can learn more about the operation of the entire educational program at the school. Finally, in school districts where JOM funds constitute a substantial portion of the budget, a dissatisfied community will have the ultimate recourse of directing the funds to other areas outside the school.[46]

Apart from contracting to administer JOM funds, a community may play a role in influencing the JOM program by participation on a JOM parent advisory committee. Although existing JOM regulations do not require that there be a parent advisory committee to review the JOM program in each school or district, the BIA has actively encouraged the formation of these committees in almost every school district which receives JOM funds. Ordinarily, parent advisory committees for JOM programs do not have a major impact on public school education because they have no power. The BIA currently has under consideration, however, new regulations which would give parent advisory committees an effective veto over the use of JOM funds in their communities.[47]

Title I Programs

Title I of the Elementary and Secondary Education Act of 1965[48] provides funds for compensatory programs to meet the needs of educationally deprived children.[49] On October 14, 1971, HEW promulgated new regulations requiring parental involvement in the Title I programs.[50] The new regulations require each local educational agency to:

> [E]stablish a council in which parents (not employed by the local educational agency) of educationally deprived children residing in attendance areas which are to be served by the project, constitute more than a simple majority, or designate for that purpose an existing organized group in which such parents will constitute more than a simple majority . . . .[51]

Without giving the parents' council outright control of the Title I program, the regulations allow a well-organized parents' group to provide substantial input into school decisionmaking. There must be "adequate procedures to insure prompt response" to suggestions from the parents' council,[52] and the parents' council must have an opportunity "to submit comments to the State educational agency" on the proposed Title I program.[53] Thus, the parents' council will have direct contact not only with the local, but also with the state education agencies. If those agencies prove nonresponsive, a complaint can be filed with the Office of Education in Washington.[54]

Indian Education Act of 1972

The movement toward Indian community control of education should receive significant support from the Indian Education Act of 1972[55] which authorizes funds for a series of new programs in elementary, secondary, and higher education. Some of the programs will be merely supplemental to the regular school program and designed to meet the special educational needs of Indian students; others will be innovative and experimental.

The requirements for parent, community, and Indian involvement in these new programs are the most stringent ever enacted into federal law. Section 305(b), which applies to supplemental programs, provides that applicants for funds must demonstrate that the proposed project has been developed:

> (i) in open consultation with parents of Indian children, teachers, and, where applicable, secondary school students, including public hearings at which such persons have had a full opportunity to understand the program for which assistance is being sought and to offer recommendations thereon, and
>
> (ii) with the *participation and approval* of a committee composed of, and selected by, parents of children participating in the program for which assistance is sought, teachers, and, where applicable, secondary school students of which at least half the members shall be such parents . . . .[56]

Thus, the parents' committee is given a flat veto over all proposals submitted under Part A of the Act.[57] The parent participation requirements under Part B of the Act, providing for discretionary grants for innovative programs, are not as rigid. In the latter instance, the statute requires only that the Commissioner of Education be "satisfied . . . that there has been adequate participation by the parents of the children to be served and tribal communities in the planning and development of the project, and that there will be such a participation in the operation and evaluation of the project."[58] Since funds have not yet been obligated under the new Act, it is too soon to tell how the parent participation requirements of Part B will be interpreted.

The movement for community control of Indian education is a reaction to the coercive assimilation through education which was imposed upon Indian communities. Indians, like other groups in the nation, are demanding that education be relevant to their needs, their culture, and their language.

Footnotes

[1] "Special Subcomm. on Indian Education, Comm. on Labor and Public Welfare, Indian Education: A National Tragedy — A National Challenge," S. Rep. No. 501, 91st Cong., 1st Sess. 106 (1969) [hereinafter cited as "Subcomm. Report"]. The Special Senate Subcommittee on Indian Education was established with bipartisan support in 1967. Senator Robert F. Kennedy served as Chairman until June 8, 1968. Senator Wayne Morse served as the second Chairman and was succeeded by Senator Edward M. Kennedy. The 220 page Report of the Senate Subcommittee has become a standard reference. *See also* "R. Havighurst, 5 The National Study of American Indian Education: The Education of Indian Children and Youth" 27 (1970).

[2] "Message from the President of the United States," H.R. Doc. No. 363, 91st Cong., 2d Sess. 6 (1970) [hereinafter cited as "President's Message"].

[3] "Senate Comm. on Labor and Public Welfare & Senate Comm. on Interior and Insular Affairs, Indian Education Act of 1971," S. Rep. No. 384, 92d Cong., 1st Sess. 13-15 (1971).

[4] "U.S. Dep't of Interior, Fiscal Year 1971 Statistics Concerning Indian Education I" [hereinafter cited as "Statistics"]. The vast majority of the 52,000 children attending federal schools comes from one of three places, the Navajo Reservation in Arizona, New Mexico and Utah (23,436), the Sioux Reservations in North and South Dakota (6,248), or the State of Alaska (6,605). Almost every child attending federal Indian schools resides on an Indian reservation.

On a nationwide basis, approximately 50 percent of Indian people live off reservations. Of these nonreservation Indians, many live in rural settlements or in small towns near the reservations while others live in major urban areas. There is a substantial variation in the economic and social conditions of Indian communities throughout the nation. Some tribes have thousands of members; many others have less than 300. The Aqua Caliente in Palm Springs, California, own small but valuable property, much of which is leased at favorable rates to entrepreneurs in that resort area, while the barren Cocopah Reservation in southwestern Arizona is one of the most desolate settlements in the nation. The degree of acculturation also varies significantly from tribe to tribe.

[5] Federal Agency Expenditures in Indian Education, Office of American Indian Affairs, U.S. Office of Educ., Information Sheet, Jan. 1972. *See* "NAACP Legal Defense and Educ. Fund & Center for Law and Educ., Harvard U., An Even Chance" 26 (1971) [hereinafter cited as "An Even Chance"] (a report on federal funds for Indian children in public school districts) regarding the misuse of these funds.

[6] "U.S. Dep't of Commerce, Statistical Abstract of the United States" 121 (1971).

[7] "Subcomm. Report," *supra* note 1, at xii-xiii; "R. Havighurst," *supra* note 1, at 22. Indians do poorly in both state and federal schools. *Compare* "Subcomm. Report," *supra* note 1, at 52-54 (Public School Findings) with *id.* at 99-104 (Federal School Findings).

[8] *See, e.g.*, Testimony of William Youpee, Chairman, Nat'l Tribal Chairmen's Ass'n, in *Hearings on S. 2724 Before the Senate Comm. on Interior and Insular Affairs*, 92d Cong., 2d Sess. 122 (1972); Statement of Jerome Buckanaga, Principal, Pine Point Experimental School, Ponsford, Minn., White Earth Reservation, in *Hearings on S. 659 Before the Subcomm. on Educ. of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 1st Sess., pt. 4, at 1831-35 (1971); Statement of Brightman, President, United Native Americans, in *Hearings on Policy, Organization, Administration, and New Legislation Concerning the American Indians Before the Subcomm. on Indian Educ. of the Senate Comm on Labor and Public Welfare*, 91st Cong., 1st Sess., pt. 1, at 44-47 (1969).

[9] "Subcomm. Report," *supra* note 1, at 27.

[10] *Id.* at 62-63; "R. Havighurst," *supra* note 1, at 35.

[11] "Subcomm. Report," *supra* note 1, at 26-27, 61-63; "R. Havighurst," *supra* note 1, at 22.

[12] "Subcomm. Report," *supra* note 1, at 27, 53, 101; *see* "R. Havighurst," *supra* note 1, at 30-31.

[13] *See* text accompanying notes 48-54 *infra*.

[14] Pub. L. No. 92-318, Sec. 401-53, 86 Stat. 334-45, *amending* 20 U.S.C. Sec. 236, 242. *See* text accompanying notes 55-58 *infra*.

[15] *See generally* "B. Johnson, Navajo Education at Rough Rock" (1968); Roessel, *An Overview of the Rough Rock Demonstration School*, 7 "J. Am. Indian Educ.," May 1968, at 2.

[16] *See, e.g., Dr. Karl Menninger Reflects on Rough Rock Demonstration School*, 7 " J. Am. Indian Educ.," May 1968, at 42; Interview with Anita B. Pfeiffer, former Principal, Rough Rock Elementary Demonstration School, in Cambridge, Mass., May 15, 1972.

[17] For example, Dr. Robert Bergman, a nationally famous psychiatrist, flies to Rough Rock regularly to work on a project with traditional Navajo medicine men.

[18] Roessel, *supra* note 15, at 11.

[19] *Community Control*, 7 "Inequality in Educ." 8, 10 (1971).

[20] *Jose* v. *School Bd.*, No. 12913-Cir. (11th Judicial Dist., N.M., 1968).

[21] Indian children residing on federal trust land are eligible to attend federal boarding schools when there are no other appropriate school facilities available to them. 25 C.F.R. Sec. 31.1(a) (1972).

[22] *See Community Control, supra* note 19 at 10-13.

[23] The facilities at Ramah are in poor condition, and this poses a serious problem.

[24] 25 C.F.R. Sec. 31.1(b) (1972).

[25] *Id.* at Sec. 31.1(a).

[26] "[W]here permitted by law and . . . in the best interests of the Indians." *Id.* Sec. 1.2.

[27] *See* text accompanying notes 70-71 . . . [in original Stanford L.R. article].

[28] "Statistics," *supra* note 4, at 13.

[29] Letter from Arthur L. MacDonald, Ph.D., and William D. Bliss, Ph.D., to Edward M. Kennedy, Jan. 7, 1969, in "Senate Comm. on Labor and Public Welfare, The Education of American Indians: A Compendium of Federal Boarding School Evaluations" 284 (1969).

[30] "Our Brother's Keeper: The Indian in White America" 40 (E. Cahn ed. 1970) [hereinafter cited as "Our Brother's Keeper"].

[31] Officials from the BIA agency on the reservation and the Area Office in Billings, Montana, suggested that the school become part of the public school system, but the community preferred to operate the school with funds obtained through contact with the BIA. Interview with Ted Risingsun, Chairman of Busby School Board, in Busby, Mont., Nov. 22, 1971.

[32] New staff members will become tribal employees.

[33] Telephone interview with Albert Ouchi, Superintendent, Chemawa Indian School, June 26, 1972.

[34] The BIA is sufficiently committed to the concept of respecting the requests of duly organized and recognized Indian boards or councils that it does respond when a direct, formal demand is made. This observation is based upon the author's 5 years of experience as a practicing attorney dealing with the BIA in Washington, BIA Area Offices in Phoenix, Sacramento, Juneau, Aberdeen, Minneapolis, Window Rock, Billings, and Albuquerque, and with local BIA agencies in Albuquerque, Santa Fe, Parker, Ariz., Sells, Ariz., Riverside, Calif., Lame Deer, Mont., and Winnebago, Neb.

[35] *See* text accompanying notes 161-64 . . . [in original S.L.R. article].

[36] 117 "Cong. Rec." S. 16, 129 (daily ed. Oct. 8, 1971). Thirty-one of the districts are located in eastern Oklahoma, and the rest are scattered throughout the West.

[37] *See* notes 166-69 and accompanying text [in original S.L.R. article].

[38] *See* 117 "Cong. Rec." S. 16 129 (daily ed. Oct. 8, 1971). Four of five school board members in Hoonah, Alaska, are Tlingit Indians. The board, moreover, is aided by a 14-member Native Education Advisory Committee. The Hoonah School has an enrollment of 200 elementary and 120 secondary students and operates on a budget of $600,000. The education program includes a Title I project in Tlingit culture (both language and heritage), teacher aides (most of whom are Alaska natives), Headstart, Follow-Through, and a state-funded day-care center.

[39] The Rocky Boy District is roughly coterminous with the Rocky Boy Reservation. In 1959, the Reservation was incorporated into the Havre Public School District, a predominantly white community, whose center is located 30 miles from the Rocky Boy Reservation. Elementary school students continued to attend school on the Reservation but under the auspices of the Havre District. In July 1970, school district lines were redrawn, and the Rocky Boy Public School District became an independent district controlled by a five-member, all-Indian board of education. Because the district contains no taxable property, the basic support for the operation of the Rocky Boy District and school is provided by Impact Aid funds, without which the Rocky Boy District could not exist. State public school funds, Title I, and Johnson-O'Malley funds augment the Impact Aid monies, but none of these sources alone can provide a separate basis for the district's existence.

[40] *See* text accompanying notes 156-60 . . . [in original S.L.R. article].

[41] *See* notes 338-65 . . . and accompanying text . . . [in original S.L.R. article].

[42] *See* notes 186-88 . . . and accompanying text . . . [in original S.L.R. article].

[43] *See* note 166 . . . and accompanying text . . . [in original S.L.R. article].

[44] *See* notes 44-47 & 56-57 . . . and accompanying texts [in original S.L.R. article].

[45] 25 U.S.C. Sec. 452 (1970).

[46] The community could use JOM funds for a supplemental program entirely outside the school. This might include trips to historic places, an arts and crafts program, the maintenance of a community center, or educational workshops. For example, at Deer River, Minnesota, the non-Indian school board was unable to reach agreement with the local Indian advisory committee on the use of JOM funds, and ultimately it voted not to accept any further JOM funding. The Indian parents then formed their own non-profit corporation and now operate a JOM program outside the school. *See* Letter from Robert B. Elion, Leech Lake Legal Services, Minn., to the author, Aug. 23, 1972, on file with *Stanford Law Review*.

[47] *See* Rosenfelt . . . ["New Regulations for Federal Funds," 10 *Inequality in Educ.* 22 (1971).]

[48] 20 U.S.C. Sec. 241(a)-(m) (1970).

[49] *See* Yudof, . . . ["Federal Funds for Public Schools", 7 *Inequality in Educ.* 20 (1971).]

[50] 45 C.F.R. *Sec.* 116.17(o) (1972).

[51] *Id.* Sec. 116.17(o) (2). A tribal education committee might insist that it be "designated" as the parents' council under this regulation.

[52] *Id.* Sec. 116.17(o) (2) (vii).

[53] *Id.* Sec. 116.17(o) (2) (viii).

[54] The Office of Education has not been particularly aggressive in responding to complaints; however, it does investigate, and it will bring pressure on local educational agencies where there is a clear violation of law. The Title I parent participation regulations may not be effective where the parents' council is divided, or where the members have been carefully selected by the local school superintendent because of their passivity. Nevertheless, they most certainly do provide an opportunity for meaningful community involvement in school programs.

[55] Pub. L. No. 92-318, Sec. 401-53, 86 Stat. 334-45, *amending* 20 U.S.C. Sec. 236-44, 881-88.

[56] *Id.* Sec. 411, 86 Stat. 337 (emphasis added).

[57] Part A of the Act provides funds for educational agencies to develop and execute programs to meet the special educational needs of the Indian students. *Id.* Sec. 411, 86 Stat. 334-39.

[58] *Id.* Sec. 421, 86 Stat. 341.

A Black Perspective on Community Control

by Kenneth W. Haskins

On January 25, 1968 a group of Black parents, educators and other members of the Black community issued a statement that grew out of the group's experiences with the schools and outlined future strategies. Among other things, the statement included the following:

> We . . . reject the concept of sub-systems because educators are taking what was essentially a Black movement for control of our schools and redefining it to their advantage, creating the concepts sub-systems, decentralization, and community schools. There must be a clear differentiation between the concepts of educational sub-systems and the movement toward self-determination. Black people will not be satisfied with the compromise that sub-systems present. We view movements toward incorporation of the concept of community control into school systems whose basic control remains with the white establishment as destructive to the movement among Black people for self-determination.[1]

I think it is appropriate in the fall of 1973 not only to recall this statement but to expand upon it since attempts to co-opt and confuse the issues continue at the same time that the movement for self-determination continues.

Crucial to the understanding of this article is that people vitally involved in action toward self-determination refer to it as a movement and they see themselves as part of a movement. Others, attempting to give this action different attributes, claim that definitions of such terms as "community" and "control" have either not been defined at all or not been defined with enough precision.[2] It is, however, the prerogative (perhaps even a necessity) of a movement to prevent itself from being defined as statistically and blandly as those not in the movement might want it to be.

Mwlina Imiri Abubadika (Sonny Carson), a veteran of the fight for community control of schools, states:

> Community Control is what the people say it is. If you are waiting for me to tell you what it is then I think it is time to use common sense instead of an imposed discipline. If it has not been explained . . . by the Carmichaels, the Gregorys and the Baldwins then I think the readers can't think that I can.[3]

A movement definition of "community" must adapt itself to the particular need at the particular time.

I doubt that anyone has problems with the definition of "control." Rather they have problems associating the term with groups of people who have been under the control of others for several hundred years. In the summer of 1971, referring to the Black community, the following observation was made:

> The intention of the Black community is to throw off all aspects of this colonial or master-slave

Kenneth W. Haskins was Principal of the Morgan School for the 1967-69 school years. He is currently Vice Superintendent of Schools in Washington, D.C.

> relationship that remains in *their* communities. (This term 'community' can encompass from the home of one Black person to the Black people of the world.) The essence of colonialism and slavery is: who has control over whom; who makes decisions; who decides which people make a living; who decides what is culturally acceptable and culturally unacceptable; who decides the way of life. The movement for community control of schools addresses itself to all of this.[4]

In order to make the topic manageable, I will concentrate on the Black community, although other groups in this country are also a part of the movement.[5]

History

Certain segments of the white community in this country have always been preoccupied with the education of Black people. Southern slaveholders clearly dictated the attitudes of the total country. The decision-makers in the North set policy and practice based upon the historical slaveholder attitudes.

The educational system for Black people began when they were captured in Africa and its purpose was to make them slaves. They were to be docile; they were to be obedient; they were to see themselves as inferior; they were to remain helpless and be dependent upon the white community. And in each instance, the opposite goals were applied to the white community. They were to produce the master class. Those whites who would not be masters could nevertheless be used in the "education" of Black people and would derive those psychological and economic rewards that accrue from having an exploited group. These same practices and roles have been institutionalized in our educational system. Any move toward changing education for Black people in America must strike at these relationships to be effective. This move goes beyond the equalizing of facilities or even beyond segregation and desegregation. It must undermine a philosophy and beliefs that have maintained themselves for over 400 years.

The dual school system was established more specifically to accomplish two separate goals than to give an "inferior education" to Black people. Education cannot serve the opposing purposes of liberation and pacification at once. Some members of the Black community try to redress the wrongs of the past by behaving as if the institutions of this country were designed to offer them the same education offered to white people, but only in a lesser degree. Nothing could be farther from the truth.

Charles Hamilton has made the following observation:

> The policy makers must now listen to those for whom they are operating: which means of course that they must be willing to share the powers of policy making. The experts must understand that what is high on the liberal social scientists' agenda does not coincide with the agenda of many Black people. The experts are still focusing on the effectiveness of existing institutions. Many Black people have moved to the evaluation of the legitimacy of these institutions.[6]

And if the legitimacy of the institution as it presently functions is being questioned, it is difficult to separate educational philosophy from political acts.

The Issues

Within the past ten years the question of community involvement in education has been raised anew in Black communities across the country.[7] Interestingly, immediately prior to this period, the Black community was described by educators as apathetic, uninterested and uninvolved in regard to the education of its children.[8] "Lack of involvement" was seen as one of the major causes for Black children's inability to achieve in school. This attitude, of course, allowed for individual Black families to be seen in a more positive light; but, as in other areas, they were considered exceptions to the rule.

The next stage in the current movement came when certain Black communities began to demonstrate against "footdragging" around integrating the schools. In New York City, for instance, there were several massive school

Photo by Deborah Feingold

boycotts involving the Black, Puerto Rican, and parts of the white communities. The school system administration ignored the fact that this type of action *is* a form of interest and involvement. The then President of the Board of Education of New York City referred to a relatively successful boycott as a "fizzle."* It became very clear that "positive" involvement of parents and the community in the problems of its children's education had to be the Board's definition and not the Black community's.

As issues become further confused and words are shifted and deliberately used interchangeably, the question of who defines becomes central. We therefore find ourselves trying to relate to concepts such as local control, community control, community involvement, parental control, parental involvement, decentralization, local boards, advisory boards, experimental districts, subsystems, etc. Although, by this time, the Black community has begun to use various terms, it is my feeling that what the Black community wants is the ultimate of community involvement — control of their children's schools to make these schools serve the purposes of Black children. Differences seem to be about strategies (what is realistic, what kind of allies do we need, etc.) rather than a disbelief that Black people should control their own destinies.

Parental involvement or community involvement then has several different interpretations, depending upon who is defining. School administrators and teachers who in the past referred to the Black community as apathetic, usually saw involvement as parents either "helping" children, or as allies "against" the children. "Helping" involvement included a home atmosphere conducive to learning, aiding children with homework, providing a place to study — or volunteering to go on school trips or visit school during Open School Week. "Against" the children involvement included expectations that parents would punish their children for teacher-reported infractions in school.

On another level, the school or school system concept of involvement relates to techniques that can best be described as "public relations." It is usually geared toward getting the community to support action that has already been taken by the principal or the School Board/administration — having the community understand the problems of running a school system, a school, or a classroom. Here, involvement can be support of school budgets, school personnel, etc.

This kind of involvement is based on the premise that the school is an institution serving the purposes that the community wants it to serve. Many Black people feel that their children's schools do not serve their needs. From the point of view of some Black parents, one of the reasons for parent participation is:

> As a necessity. This would be partly due to a perceived inability of traditional educators . . . to com-

> pletely deal with the children they are 'educating' either in terms of needs or desires. Some of this may be due to the social climate in our country which fosters certain prejudices and limits our ability to deal with others in terms of complete equality.[10]

A group of parents, educators, and other community people speaking to the current concept of control as the only viable form of "involvement" said:

> Black people in American cities are in the process of developing the power to assume control of these public and private institutions in our community. The single institution which carries the heaviest responsibility for dispensing or promulgating those values which identify a group consciousness of itself is the educational system. To leave the education of Black children in the hands of people who are white and who are racist is tantamount to suicide.[11]

Involvement without some aspect of control can only lead to those "involved" being used by those in "control."

What's in a Name?

For Black people to be controlled by the white community is, of course, in line with the original purposes that brought them from Africa to America. It is on this basis that Black people in the past have been involved in education in their communities. Let us then examine some of the terms that are interchangeably used for these involvement programs.

1. *Community or Parental Involvement* can be control and essentially is in white middle class communities where teachers and school administrators are from the same group as parents. For the Black community, however, it is usually used to avoid dealing with the concept of actual control.

2. *Decentralization* is an administrative device that does nothing to change the basic group in control. It functions to rearrange power within the same decision-making group (central boards, superintendents, principals, teachers). Although the delegation of certain decision-making responsibilities to smaller administrative units does make it possible for the "consumer" to more easily identify the decision-makers, it does not insure greater accountability to the community. This is the concept most often passed off as community control.[12]

3. *Local Control*, like decentralization, is an attempt to imply that the movement which grew out of the Black community is applicable and needed by all communities. Further, it limits the definition of "community" to residents in a particular locality or attendants of a particular school. When the concept of local control is applied to decentralized areas that are determined by those already in control (confusing neighborhood with community), or when integration distributes Black children so that they are a minority in each school population, then the potential power of the Black community is diluted and their desires are not respected. Local control further suggests that help from outside the particular locality is foreign. Local Boards also fit into this definition.

4. *Advisory Boards or Committees* also dilute the concepts of control. Advisory boards just advise, and decision-makers have no obligation to follow their advice. Further, in my experience, there are no advisory boards in Black, Puerto Rican, Chicano, Native American, or poor white communities that routinely have resources, information or technical help enabling them to give sound and well considered advice.

5. *Subsystems, Experimental Districts, Demonstration Districts, etc.* are forms of organization that do not change ultimate control. They allow some autonomy in day to day operation, but *decisions* in programs to continue or not, to supply or not, to give tenure, due process, etc., all are made elsewhere. (This was the case with I.S. 201 Complex, and Ocean Hill-Brownsville.)

On the basis of an understanding of the difference between these listed involvement

groups and true control, the advocates of community control in Detroit coined the slogan "Don't Say Decentralization, Say Community Control" during the proposal of a decentralization plan (which was ultimately instituted). Other proposals represent the kinds of compromises controlling "liberals" make for the community. For example, student rights and bilingual programs though they have worth in themselves, still represent control largely by others than the community, or only give the community a portion of control. Tuition vouchers purporting to give control to communities on a family by family basis, also have a built-in limitation: the only power they offer is consumer purchasing power. Individual option is not broad enough for real community control.

Scope

The community control in education movement therefore is not addressing itself to minor reform but to massive and fundamental changes in the schools. There are several forms that the movement has taken, spanning the variety of possibilities of schooling available in the country.

The Nation of Islam provided a great deal of the ideology about Black control of their own institutions. Some models of applying this ideology to community control in public education are I.S. 201 Complex, Ocean Hill-Brownsville, both in New York; Morgan Community School in Washington, D.C.; and the Nairobi School System in California. Other public schools in places such as Dayton, Chicago, Philadelphia, Newark, and Boston are experiencing more community involvement than ever before.

This year there have been developments in the public sector which are very important to the movement. In Atlanta the local branch of the NAACP (later reprimanded by the National Office for its action) agreed with factions of the white community to ease up on their demands for massive desegregation in exchange for more decision-making control in the school system. As a result, Atlanta now has a Black Superintendent of Schools as well as the guarantee of at least 50 percent Black people in other top administrative posts. This starkly contrasts with other Southern communities where there have been mass dismissals of Black administrators and teachers as desegregation is implemented.[13]

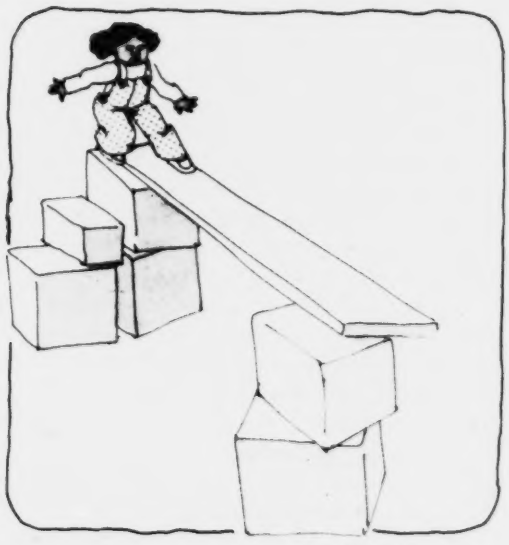
In Washington, D.C., where the public school population is ninety-five percent Black, a Black woman (who was the chief administrator in the Woodlawn District of Chicago, an early venture in community control) was selected as the new Superintendent of Schools.

Another form of community control has developed in what can be described as alternative schools. These are best known in Boston, where alternative schools developed the Federation of Boston Community Schools after many unsuccessful attempts to influence the public school system. Another example is the Milwaukee Federation of Schools. Although most of these schools originally started out integrated, and many still are, they are primarily directed by the Black community. These schools are trying to build and develop a Black community that has been deliberately left underdeveloped, and differ from white "free schools" which are trying to escape a community that has developed beyond what their founders consider human and humane.

Then there are the independent Black institutions. These can be public or private, but are not supported by public funds. They include schools such as Urhuru Sasa in Brooklyn, African Free School in Newark, several pre-school centers in Atlanta, and Freedom Library Day School in Philadelphia. Other alternatives are educational institutions run by and for Black people such as Afram Associates in Harlem and The New Approach Method in Trenton, N.J. Some of the leaders of these schools are veterans of the struggle for control of the public schools in New York and other places.[14] Closely allied to the alternative and independent Black institutions is the movement to make inner city Catholic parochial schools responsive to the communities they serve. Some examples of this work, led by the National Black Sisters Conference, can be seen at St. Joseph's School in Boston and St. Joseph's in Pittsburgh, among others.[15]

The Center for Study of Student Citizenship Rights and Responsibilities in Dayton[16] is a direct outgrowth of the move-

ment for community control. Other action is demonstrated in the moves for Black studies programs on the level of higher education at Malcolm X Liberation University in Greensboro, N.C., The Institute of the Black World in Atlanta, and the Center for Black Education in Washington, D.C. Black campuses, such as Southern University in Baton Rouge, are struggling to make the schools more accountable to the Black community. Another form of involvement which has a close relationship to the movement and can be developed further are the Parent and Community Advisory Councils that are a part of Head Start, Title I, and Follow Through programs.[17] Those developments depend upon



Cartoon by A. Wanper

advisory groups' capability to gather the necessary information to render advice, and power to enforce the acceptance of their advice.

Documents produced by some of the groups mentioned above provide a picture of what the Black community deems necessary for effective involvement. I.S. 201 Complex, a group of public schools in Harlem, listed the following points in "A Twenty Point Program for Real School Community Control:"[18]

1. District boundaries defined by the communities themselves — organized on the basis of one district for each intermediate or junior high school complex.
2. School board election procedures developed by the school communities and held by the communities. This includes determining number of members, qualifications and voter eligibility.
3. Full employment of community residents. All available positions to be filled by residents *first*.
4. Accountability of all administrative and teaching staff. Teachers must believe in our children's ability to learn; teachers must respect the children and the community.
5. Full utilization of school buildings. Facilities must be available to the communities for afternoon, night and weekend use.
6. Availability of adult education programs for all, including both academic and job training courses.
7. Abolition of all testing until tests can be developed which are relevant and geared to the requirements of individual communities.
8. Control of all school construction and maintenance funds.
9. Free breakfast and lunch programs for all children. No more soup and bread and butter sandwiches. Nutritious and appealing meals, including soul food, rice and beans, and Chinese food, will be served.
10. Establishment of educational programs which teach modern day awareness of the real world. This includes Puerto Rican, Black and Chinese culture and history, problems of unemployment, poor housing, malnutrition, police brutality, racism and other forms of oppression.
11. An end to all suspensions, dismissals and other abuses against children until fair procedures can be devised to deal with each individual case.
12. Development of programs to deal with drug addiction.
13. Establishment of student participation in the decision-making process, both at junior high and high school levels.
14. Immediate repair of all deteriorated

school buildings and start of new construction to reduce overcrowding. Renovation of city-owned, but abandoned structures, to be considered for this purpose.

15. Immediate changes in the teacher and supervisory licensing and certification procedures so as to eliminate practices which have been used to exclude minority group persons from teaching and supervisory positions. Abolition of the Board of Education, which exists only in New York City.
16. Development of bi-lingual classes and programs at all levels.
17. Establishment of medical and health services for all children. Mandatory assignment of at least one full-time doctor and one full-time nurse to each school.
18. Establishment of equitable grievance procedures to protect the rights of parents, children and students.
19. Free access to their children's records for all parents, as is their legal right. Nothing to be put in children's records unless approved by parents.
20. Abolishment of the tracking system which was declared unconstitutional and discriminates against Black, Puerto Rican and poor.[19]

The Federation of Boston Community Schools, Inc., makes the following statement:

> The community schools address themselves to many problems; the need to break away from a system buried in colonial tradition, the need for evaluative criteria that are more conclusive than test scores, the need for a system that does not merely serve the parochial interest of the dominant class, and the need to provide local groups with some means of making educators accountable for the learning they are supposed to impart. Whether or not we must have alternative schools really depends on whether or not we want to change society.[20]

Finally, we must look at a statement made by Black nuns in relation to parochial schools:

> Black people must control those Catholic Schools that are in Black communities and or serve a predominantly Black student body. . .
>
> The Catholic Church must continue and increase its moral and financial commitment and support of these schools, without attempting to dictate philosophy, policies or procedures.
>
> The philosophy, policies and procedures in these schools must grow out of and be relevant to the desire, aspirations, felt needs and experiences of the communities they serve.[21]

What is being attacked is not only the total institution, but the very reason for its existence. All aspects come under scrutiny as the movement for involvement logically reaches demand for control. It is impossible to make necessary changes to meet the needs of oppressed groups without a change in power relationships.

Programs

All of the schools that have moved toward greater control by the Black community have made some improvements in their ability to work with their student bodies. All have done this under severe stress. Those who were receiving public funds (I.S. 201, Ocean Hill-Brownsville) had their energies diverted in political struggles. Those not receiving public funds are struggling with financial burdens. All have certain philosophical concepts in common. Although there are differences about details among the various schools or units, the basic premises, the reasons for needing control, what is to be done when control is gained, are similar. Perhaps the most common characteristic of the community school — making it almost the opposite of ordinary American public schools as they relate to minorities — is that it is totally accountable to its public. All who live in the community belong in the school — or more to the point — the school belongs to them. There are no deviants, no misfits, no

problems that are not *our* problems. The rule becomes inclusion rather than exclusion. Teacher training, curriculum, teaching methods, grouping practices, rules and regulations, use of social workers, psychologists, attendance officers (if used at all) all flow from this premise.

Morgan School

A brief study of the first two years of community control at the Morgan Community School in Washington, D.C. (September 1967-June 1969) will give some indication of what can be done. As a public school, Morgan was larger and had more constraints put upon it than the alternative schools and independent Black institutions. On the other hand Ocean Hill-Brownsville and I.S. 201 faced many more political pressures from teachers' unions, school administrators and elected officials. They were also much larger as units and therefore more complicated to administer.

An article written in October 1967 stated:

> Thomas P. Morgan School is housed in two old buildings in the inner city of Washington, D.C. The area in which the Morgan School is located is a crowded conglomerate made up of poor Negroes, old middle class Negro families, and a few young prosperous whites who have recently moved in. Last year, the school was about 99% Negro; this year there are some 30 white children [total school population was 760]. For the past two years, there has been an active community council in the area, and before that a heritage of civic participation in community problems. Through the council's efforts and acting in conjunction with a privately funded group, the Institute for Policy Studies, the D.C. School Board was persuaded to contract out the Morgan School to be jointly run by Antioch College and an elected community school council.[22]

The school began operating in September of 1967 under a vague definition of community control. All projects in the public sector started by including a university among the decision-makers, and some included larger community agencies not directly related to the children attending the school. The influence of teacher organizations varied. The larger system continued to retain very crucial powers.

Morgan Community School provides one example of this model. Although parents had been the ones pushing for changes, the governance of the school was actually turned over to Antioch College. Parents and community members were to wield little or no power. A May 1967 memo from then Superintendent of Schools Carl F. Hansen to the District of Columbia Board of Education stated:

> A proposal is being developed between Antioch College and the school system for an experimental demonstration in urban teaching at Morgan Annex Elementary School . . . While the details of the proposal are to be worked out, the superintendent wishes to advise The Board that the plan concept has the full endorsement of the administration provided the operational aspects can be coordinated.

Allocation of Power

The powers given to Antioch were full responsibility for curriculum formulation and instruction, recommendation of teachers and other staff members subject to the approval of the Board of Education, staff organization (not to exceed ordinary budgetary expenditures to be allocated for books, supplies, maintenance and staffing in proportion to "current tables of standards") and the right to seek funds from outside sources to supplement existing sources.

The power of the community was stated in this manner:

> The school community will be active participants through the Parents' Advisory Board, to be comprised of parents elected by the parents [or] guardians of pupils attending the school. The involvement of parents through the Parents' Advisory Board should im-

> prove the relevance of the school program to the needs of the community.

Originally then, there was not community control by the Black community but a shift of power from one element in the white power structure to another. The new controlling institution was perhaps more benevolent, but nevertheless the white institution was the legal decision-maker. Although there were staff from the College available for immediate questions and complaints, it soon became evident that the Antioch representatives would have as much trouble addressing themselves to the needs of the Black community as the larger system had.

The Parent Advisory Committee was elected after the school year began and all plans had been made. There was input by community people in the initial planning, but the wants of the majority of the poor Black community had not been fully clear. Differences between the College and the Local Board (a title the Board chose rather than Parent Advisory Committee) were very quickly seen.

The Antioch people had done their best planning around utilizing the school as a laboratory and as an institution to train *their* students. The Local Board was primarily interested in service to the children in the school. They looked to the College for funds, program and advice, and were somewhat resentful of certain unilateral decisions the College made.

Paul Lauter describes some of the crucial conflicts at that point and the administrative changes which resulted:

> The administrative staff of the school and the project had long since recognized that having the College in a managerial role was undesirable. This arrangement left no appropriate role for the principal, it overstretched the College project's limited resources, and it undermined what the College staff could contribute by way of support and suggestion by casting it as the 'authority' to be obeyed — or resisted. It almost inevitably set Antioch over against the community in an ambiguous struggle for control . . .
>
> . . . The College decided unilaterally that an administrative structure including both a project director [from Antioch] and a principal [from the community] would inevitably produce conflicts of leadership, and that therefore the position of project director would have to be eliminated forthwith.[23]

Consequently, the relationship between Antioch and the Local Board began to change. One of the expected outcomes as a result of the creation of the Parents' Advisory Committee — to "improve the relevance of the school program to the needs of the community" — was a list of demands made by the parents and Board of the Morgan School in "The First Annual Report to the Community" in June 1968:

> People want the kind of school where their children will learn those things which they need to know in order to survive in this society. People want the kind of school where they and their children are treated with respect and allowed to carry themselves with dignity. People want the kind of school that welcomes them and their children and does not insult them by indicating that something is wrong with the way they look, speak, or dress. They believe that the school staff and school board should be responsible to them and their needs and should not dictate to them what someone else has decided is 'good for them.' The school should take its character from the people living in the community and from the children utilizing the school rather than rigidly defining itself as an institution accepting only those people who already fit into a set definition.[24]

The most basic change began to occur in self-concepts. Black children were not to be taught to be ashamed of Blackness. Spanish-speaking children were not taught that it is shameful to speak the language of their

parents. The children began to learn *their* culture and speak *their* language before they extended their boundaries to more alien cultures.

Because the norms of the school were those of the community in which the school was located, social problems were minimal. Any aspect of behavior which was acceptable in the home and the streets had to be tolerated in the school. Suspension and expulsion practices ceased. (At the Morgan School there were no suspensions or expulsions; at Ocean Hill-Brownsville during "community control" there were 30 suspensions for eight schools, as compared to the 628 for a similar period.[25]) If the school sees itself as an integral part of the community, it has a responsibility to help solve all problems and not exclude them as "non-educational" matters.

Community people were hired from the beginning as staff members, further tying school and community together. As the range of tolerated behavior for children was increased, staff also began to relax. Soon the school took on aspects of a community itself, and more positive values were substituted for what had been valued in the past. Many unimportant rules and regulations which constantly bring adults and children into conflict were eliminated and negative behavior diminished. Children were respected for what they were.

The following were some additional changes in practice and some of the consequences of these changes (Ocean Hill-Brownsville, I.S. 201 Complex and others indicated many of the same trends):

Academics: Reading scores went up for both years. (The first year Morgan was one of only six out 176 elementary schools to show an increase.) Math scores went up for both years. Observers felt children were happy, relaxed, and were enjoying learning. Competition was essentially eliminated. Forms of cooperation were instituted.

Organization: Teachers and community workers worked in teams of seven or eight with one hundred or so children. Blurring of status lines was fostered; all were viewed as community members with different things to offer. Teams were relatively autonomous. Children were not tracked and wide-range age grouping was instituted. There was flexibility to shift organization and practice to accommodate all children.

Admissions: All children of the community were admitted. None were suspended. There were no "crisis rooms." None were referred to special schools (the school population included one autistic child, others with less serious emotional problems, and several physically handicapped children).

Behavior: Vandalism decreased by 70 percent. Everyone was encouraged to handle his or her own interpersonal problems. Rules were changed to make a more natural environment for children. Children were free to move about the school. Corporal punishment was forbidden. Referrals to psychologists dropped to a few a year. Attendance increased to 90 percent.

Community: All were welcome in school at any time. The building was open early in the morning to late at night. Policy was made by local people. Local people interviewed and hired staff. The local Board incorporated, began to seek additional funding, and made major input into site selection, choice of architect and plans for a new building.

Use of the Building: Night classes were held in the school. Dances and parties were held in the school. The funeral of the President of the Local Board was held in the auditorium. The Inauguration of Dick Gregory as President in Exile occurred in the auditorium. The Washington Teachers' Union held a leadership conference there. A general meeting of trade unionists met in the building. The school was used for training teachers for Freedom Schools for the Poor People's Campaign. Consumer groups, credit unions, tenant groups, etc. grew out of activities in the school.

Other Social Services: Special free lunch was eliminated; all shared what was there. The police could no longer come into the school without permission. A clinic from Children's Hospital was put in the school for the total community — in what had been the principal's office. A unit from Howard University School of Social Work was located in the school. New approaches to use of school social workers were developed.

Changing teacher attitudes, difficult to categorize but of utmost importance, were reflected most in what they began to do in and for the school and the community. Teacher

turnover diminished to a minimum. After two years there was a waiting list of teachers wanting to work at Morgan. In collaboration with the Teachers' Union, the school was moving toward a form of peer evaluation. The Teachers' Union used the building for some of its own important events. Teachers expressed satisfaction with their role, their ability to contribute to decisions, and their growth on the job. All staff worked many hours beyond those required. Some teachers who lived some distance from the school nevertheless enrolled their own children at Morgan.

Photo by Deborah Feingold

These few examples compare favorably to the list of implemented demands of the I.S. 201 Complex. When direction comes from those who do not have an investment in the status quo the potential is unlimited.

The most important change though was in the atmosphere of the school and how the children and the community felt about it. Some excerpts of letters from visitors of the school give some descriptions and evaluations:

> Whenever the depressing state of American society, particularly American education, becomes so overburdening that I feel I can no longer reasonably be expected to bear the weight, a visit to Morgan Community School is called for. Something is happening at your school that is hopeful and optimistic — probably the most hopeful and optimistic school experience I have encountered anywhere in my extensive travels throughout the United States. If I felt that I knew more about what "Soul" really meant, I would like to say that the Morgan Community School is the first "Soul" school in the country.[26]

> Interestingly enough, I do not feel that the issue of the Black experience can be extrapolated since it pervades . . . That point is made unquestionably and non-negotiably. The feeling tones, the humane efforts utilized to help teachers understand the behavior of their charges, the many dialects of the students and teachers which became the media for understanding rather than a vehicle for enforcing "standards." The noise, pace, and climate of the school and the valuation put on freedom and responsibility rendered white paternalism unemployed and white racism literally irrelevant. The actors were listening to the same drummer — those beautiful Black kids to whom Morgan was providing the fullest opportunities to become who they want to become.[27]

Footnotes

[1]*Position Statement: Five State Organizing Committee for Community Control*, January 25, 1968, Harvard University, Cambridge, Mass., p. 2.

[2]See Alan Altshuler, *Community Control*, Pegasus, New York, 1970; Leonard J. Fein, *The Ecology of Public Schools*, Pegasus, New York, 1971; Bertram M. Beck, "Community Control: A Distraction Not an Answer," *Social Work*, Vol. 14, No. 4, Oct. 1969.

[3]Mwlina Imiri Abubadika, *The Education of Sonny Carson*, W.W. Norton and Co., Inc., New York, 1972, p. 203.

[4]Kenneth W. Haskins in *Hearings Before the Select Committee on Equal Educational Opportunity of the U.S. Senate, Part 13: Quality and Control of Urban School*, Washington, D.C., July 25, 29, August 5, 1971, p. 5868.

[5]The Chicano community in Crystal City and Edgewood, Texas are notable examples. The resistance of the Chinese people in San Francisco to court ordered desegregation is another. The Puerto Rican community is a part of the I.S. 201 and Ocean Hill chapters, among others. Native Americans have a Navajo controlled school in Rough Rock, Arizona in addition to beginnings in Ramah, New Mexico and Rocky Boy, Montana. Interestingly, government sanctioned plans for community control by Native Americans are being put forth. I suspect that this is in part because Indians are small enough in number not to make major alterations in the power relations in this country. Legally, they have a special status stemming from the time when they were sovereign nations that entered into treaties with the U.S. This factor makes Indian moves for control less disruptive.

[6]Charles V. Hamilton, "Race and Education, A Search for Legitimacy," *Harvard Educational Review*, 38:4, Fall 1968, p. 674.

[7]The question has been present almost from the beginnings of this nation. Some earlier writings from the 1930's are: W.E.B. Dubois, "Does the Negro Need Separate Schools," *Journal of Negro Education*, July 1935; and Carter G. Woodson, *The Mis-Education of the Negro*, Associated Publishers, Washington, D.C., 1933.

[8]Bel Kaufman, *Up the Down Staircase*, Avon Books, New York, 1964, pp. 215-219, 209-214.

[9]Preston Wilcox, "Troublemakers at the Board of Education: Fact or Fantasy" in *Issues and Insights*, 1:1, Spring 1967, pp. 33-35.

[10]*Planning for Parent Participation in Follow Through*, AFRAM Associates, Inc., Harlem, January 1, 1970, p. 1.

[11]*Position Statement: Five State Organizing Committee for Community Control*, p. 1.

[12]For example, see Stephen Arons, "The Political Reorganization of Schools: Decentralization and Alternatives to Public Education," *Inequality in Education*, No. 3 & 4, p. 6.

[13]*Hearings Before the Select Committee on Equal Educational Opportunity of the U.S. Senate, Part 10: Displacement and Present Status of Black School Principals in Desegregated School Districts*, Washington, D.C., June 14, 1971.

[14]Contact the Council of Independent Black Institutions, P. O. Box 57, Lefferts Station, Brooklyn, New York 11228.

[15]Contact the National Black Sisters Conference, 3333 Fifth Avenue, Pittsburgh, Pa. 15213 *re: Project Design.*

[16]Center for the Study of Student Citizenship Rights and Responsibilities, 1145 Germantown Street, Dayton, Ohio 45408.

[17]a) Steering Committee for a National Follow Through Parent Advisory Committee, 68-72 East 131 Street, Harlem, New York 10037

b) National Coalition of ESEA Title I Parents, c/o NAACP Legal Defense Fund, 1028 Connecticut Avenue. N.W., Washington, D.C. 20036.

[18]Some of the early confusion between the terms "community control" and "local control" probably stemmed from I.S. 201. I.S. 201 is located in the heart of Harlem where the term local could only mean the Black and Puerto Rican communities. That the original demands for control centered around the failure of integration and began with the insistence that the principal of the school be Black or Puerto Rican (since all of the children were) should have, however, made the issue clear.

[19]*Action Stimulator #32: A Twenty Point Program for Real School Community Control*, AFRAM Associates, Inc., Harlem, April 1970, pp. 1-2; see also *Position Paper: The Future of the Arthur A. Schonberg I.S. 201 Complex Demonstration Project*, April 1970, pp. 3-5; and Frank J. Satterwhite, *Planning Independent Black Educational Institutions*, Moja Publishing House, Ltd., Harlem, January 1971.

[20]*New Dimensions in Public Education*, Part I, Federation of Boston Community Schools, Boston, March 1972, p. 4 (mimeographed).

[21]*Policy Statement of the National Black Sisters Conference: Educational Component*, National Black Sisters Conference, Pittsburgh, August 1971.

[22]"New Experiment in Education," *Washington Bulletin*, Vol. 20, Issue #25, October 23, 1967, p. 121.

[23]Paul Lauter, "The Short, Happy Life of the Adams-Morgan Community School Project," *Harvard Educational Review*, 38:2, Spring 1968, pp. 258, 259.

[24]*Annual Report to the Community School: Term 1967-68*, Morgan Community School Board, Washington, D.C., August 1968 (mimeographed).

[25]Mario D. Fantini, "Participation, Decentralization, Community Control and Quality Education," *Teachers College Record*, Vol. 71, No. 1, September 1969, p. 100; see also *Action Stimulator #13: Objective Achievements and Community Control*, AFRAM Associates, Inc., Harlem, December 13, 1969, p. 1.

[26]Letter from Bernard Kessler to the Principal, March 14, 1969.

[27]Letter from Preston Wilcox to the Principal (after viewing a film made at the Morgan School), February 26, 1970.

Community Control: Some Constitutional and Political Reservations

by Leonard P. Strickman

The movement for "community control" of schools has been a response to urban educational bureaucracies which are insensitive to, or in callous disregard of, the needs of school children from racial and ethnic minorities. Its objectives, educational and political, have emerged with particular vigor in the wake of government defaults upon the promise to minority children of quality integrated education.

Some proponents of community control acknowledge that administrative decentralization of school functions can have some beneficent effects in bringing decision-makers in closer contact with students and their parents. But they argue that the major culturally defined needs of minority children will remain unattended so long as educational policies are not made by the communities from which the children come. While they would, for the most part, agree on the primacy of giving children basic skills in reading and arithmetic, they suggest that even the ultimate curriculum cannot succeed if children's *capacity* to learn is undermined by an institutional absence of respect for their heritage and culture, in some cases their language, and ultimately themselves.

When confronted by a documented list of "community control" experiments which have failed to raise significantly achievement test scores of participating children, proponents tend to rely on three arguments:

1. The experiments have not involved true community control. Major decision-making power has always resided in central administration.
2. Achievement tests used are normally culturally biased, but in any event, are not an accurate evaluation of student learning.
3. Community control must be viewed as an essentially political movement of minority communities. As a result achievement scores cannot be expected to rise until political power over schools is consolidated and the community can concentrate on substantive objectives rather than securing or maintaining the power to achieve them.

As with the racial integration of schools in northern urban areas, perhaps "community control" has not been given a real chance. Yet perhaps, also, community control mechanisms, as they are currently conceived, are intrinsically defective — legally and politically. While I share the deep disdain for the insensitivity and ineffectiveness of most educational bureaucracies that community control proponents have, I must assert reservations about the constitutional status of community control, and the impact of recent United States Supreme Court decisions on its political future.

Defining "Community Control"

In the context of public education, "control" is an easy concept with which to work. This is because it involves the cumulation of separable decision-making powers in a particular person or institution. There may be different degrees or qualities of control; it is such differences of degree which critics of present "community control" experiments contend are so substantial as to be differences in kind. But control remains power, and our legal

Leonard P. Strickman, Associate Professor at Boston College Law School, was formerly Minority Counsel to the U.S. Senate Select Committee on Equal Educational Opportunity.

institutions have a great deal of experience in granting and limiting power through the process of definition.

Defining "community" is quite another matter. Some say that the "community" part of "community control" needs no definition — that the "community" can and will define itself. While this may provide a satisfactory framework for social workers and sociologists, a self-defining concept of community is not very helpful to lawyers or legislators.

It is true that an unrestricted[1] tuition voucher system would, if constitutional,[2] permit legally workable self-defined communities of interest, i.e. parents of children who have chosen to attend the same school. The underlying community of interest might involve residential proximity, racial or ethnic background, common interest in fine arts, commitment to a particular political philosophy or religious sect, admiration of a particular school principal, or any one of an infinite number of others. But legally, "community" would be defined by a single measurable factor — attendance of one's children at a common school.

Yet many educators at the forefront of the urban community control movement tend to reject voucher concepts of community. It goes without saying, as indeed it must if obvious constitutional obstacles are recognized, that to most of them "community" means primarily racial or ethnic homogeneity, and secondarily, social and geographical proximity. Thus, an illustration of "community control" would seem to be "black neighborhood control."

The major constitutional problem is obvious. Except as a remedy for unconstitutional discrimination,[3] racial classifications, in order to be acceptable under the equal protection clause of the Fourteenth Amendment (and the Civil Rights Act of 1964), must withstand "most rigid scrutiny."[4] There is no reason to believe that the rationale supporting racially or ethnically defined community control can satisfy that test, particularly where a transfer of some political power to segregated minorities will at least in the short run perpetuate segregation.[5]

The racial gerrymandering which seems to be an implicit requirement for establishing "black neighborhood control" also has constitutional infirmities.[6] Even if such gerrymandering were permissible, it is unclear how shifts in demographic patterns would affect community controlled school systems already in operation. Would they require annual reassessment of boundary lines to maintain racial and ethnic homogeneity?

The problem of geopolitical boundaries is compounded in urban areas with more than one minority group. To the extent that homogeneity is a premise of community control, the shared deprivations of racial and ethnic minorities frequently place them in the same or adjacent neighborhoods. And their interests and perceptions are not identical. Witness the acrimony resulting in New York City from the attempt to draw boundary lines for decentralized districts affecting the interests of blacks, Puerto Ricans, Chinese, and other minorities fewer in number.[7]

The foregoing is not intended to suggest that difficulties in redistributing political power and the educational policy function should prevent us from continuing to seek such redistribution. Rather, it suggests we may have to focus on alternative means.

Community Control and *Rodriguez*

Those who assert the need for community[8] control do not usually have the political power to dictate educational policies of the public schools which their children attend. Community control does not and cannot, however, mean total independence in establishing and maintaining a public school system at the community level, for most minority communities simply do not have the wealth to adequately finance their own educational system.

Prior to the decision of The United States Supreme Court in *San Antonio Independent School District* v. *Rodriguez*,[9] a political scenario for the achievement of community control might have been constructed as follows: a) The principle established in *Serrano* v. *Priest*[10] would demand that revenue raised for education be equalized on a statewide basis assuring that any "secessionist" part of an existing school system would not be required to tax itself at any more than the median statewide rate in order to receive an average per capita share of statewide revenues; and b) the

"threat" of an integration alternative would persuade urban educational bureaucracies to loosen their grips on minority schools and acquiesce in the existence of new community control districts.

While *Serrano* remains the law in California,[11] the *Rodriguez* decision destroys the foregoing scenario nationally. Even assuming that racially defined community control impedes neither independent rights under the Fourteenth Amendment nor constitutionally required remedies for *de jure* segregation, any community which persuades central urban administration, or a state legislature, of its rights to independent decision-making power must also now carry the burden of securing continued central financing for its independently run schools. In the absence of constitutional mandate, it is difficult to foresee any such result. Thus, the ruling by the *Rodriguez* court that the locally based and administered property tax is not a violation of the equal protection clause has effectively undercut a constitutional prop apparently vital to the political achievement of community control.

Community Control, Integration and *Keyes*

The constitutional tension between integration and community control has been the subject of much discussion.[12] David Kirp has suggested (rather persuasively distinguishing *Green* v. *New Kent County School Board*[13] and other "freedom of choice" cases) that racial geopolitical classification for the purposes of establishing community control can be justified under the equal protection clause so long as those within racially defined communities are given the "free choice" option of attending school elsewhere. His equal protection analysis, however, seems to rely on the premise of a pre-existing state of *de facto* rather than *de jure* segregation.[14]

The recent opinion of the United States Supreme Court in *Keyes* v. *School District No. 1, Denver, Colorado*[15] seems to reaffirm that desegregation is the pervasive and exclusive remedy for *de jure* segregation. School boards found guilty of racial or ethnic discrimination contributing to segregation in a "substantial portion" of the school system have the burden of demonstrating that any other existing racial isolation is not the result of intentionally segregative acts. Failure of a school board to carry such a burden will result in system-wide desegregation. The *Keyes* standards are likely to bring about a far greater number of extensive desegregation orders in the North than the courts have heretofore issued. *United States* v. *Scotland Neck City Board of Education*[16] and *Wright* v. *City of Emporia*[17] would seem to rule out community control — racially or ethnically defined or identifiable — for school systems found *de jure* segregated, notwithstanding the existence of reasonable educational hypotheses supporting its adoption. It would not even be necessary for those challenging the creation of a new school district to prove racially motivated intent; the effect of impeding desegregation would be sufficient to bar such a reorganization.[18]

I believe this relatively inflexible reading of the cases is supported by the Court's line of decision during the past five years. And I believe it is justified as a matter of policy if one acknowledges that progress, political as well as educational, has been achieved by black communities throughout the South largely as a consequence of the decisions in *Brown* v. *Board of Education* and *Green* v. *New Kent County School Board* and, at least since 1968, an admirable inflexibility by the courts in assuring that their constitutional rulings are implemented.

There can be little doubt that our society is too fundamentally racist to achieve voluntary integration of schools on a widescale basis. But court-ordered desegregation remains potentially viable. It would be a great mistake to rewrite the Court decisions just when their nationwide applicability has become manifest in order to promote a theory whose viability, while arguable, is unproven.

Conclusion

Most of the literature of community control has assumed centralized financing. Adding student assignment as a function of central administration for the purpose of achieving integration, while obviously inconsistent with the premise of necessary racial or ethnic homogeneity, need not take questions of budgetary priorities, curricular program, personnel policies, etc. out of the hands of the community of parents whose children attend a

particular school. And such a concept of "community" — or more accurately, "parent" — control is undoubtedly constitutional.

Is it feasible and if so, would the result be more sensitive treatment of minority children? Experience seems to indicate that a higher level of parent interest and involvement in the schools usually accompanies implementation of an integration plan. If parents affected by court ordered desegregation desire a more active role in establishing educational policies and priorities, perhaps the transfer of political power can be successfully achieved by all parents, minority and non-minority, acting as a single interest group. Should such a transfer occur, I think we would be entitled to an optimistic view that in the context of the enforcement of adequate anti-discrimination laws already on the books, minority and non-minority parents can work out their differences to the benefit of all their children.

Lest I be accused of new heights of political naiveté, let me acknowledge that teachers unions are likely to be a vitally important obstacle to achieving this order of "parent control". In the absence of some new understanding between parents and teachers on which a common philosophy of school governance can be based, any effective transferral of power presently held centrally to constituent parent groups will be impossible.

Footnotes

[1]The "unrestricted" voucher would guarantee its holder's child admission to the school of his first choice. Thus, unlimited elasticity in a school's capacity to expand enrollment is presumed.

[2]Resultant segregation of schools and use of vouchers for attendance at religious schools raise the most obvious constitutional questions associated with unrestricted vouchers. See e.g. Comment, 3 Pacific L. J. 90 (1972).

[3]See *e.g. Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

[4]See *e.g. McLaughlin v. Florida*, 379 U.S. 184 (1964).

[5]Racial classifications have almost invariably failed to withstand strict judicial scrutiny; *contra Korematsu v. U.S.*, 323 U.S. 214 (1944). For a discussion of the legal difficulties encountered by the Berkeley, California school system which, in the context of a voluntary desegregation plan, established two small alternative schools for minority students with special needs, see Appleton, Alternative Schools for Minority Students, 61 Cal. L. Rev. 858 (1973). The Department of Health, Education and Welfare has taken the position that the Berkeley system has been in violation of Title VI of The Civil Rights Act of 1964 (therefore, presumably, the Fourteenth Amendment equal protection clause).

[6]See *e.g. Keyes v. School District No. 1, Denver, Colorado*, 93 S.Ct. 2686 (1973) where the Supreme Court approved the finding of the district court that racial gerrymandering of school attendance zones was constitutionally impermissible.

[7]This issue is by and large unrelated to the major criticisms of New York City's decentralization, which focused on the absence of "control" rather than the definition of "community."

[8]Notwithstanding my difficulty in accepting the constitutionality of a racially and geographically defined community, that will be my understanding of the word for the remainder of this article.

[9]93 S.Ct. 1278 (1973).

[10]495 Cal. Rptr. 601, 487 P.2d 1241 (1971).

[11]The California Supreme Court relied on provisions of the state constitution as well as the federal Constitution to reach its result.

[12]See *e.g.* Dimond, Reform of the Government of Education: A Resolution of the Conflict Between "Integration" and "Community Control." 16 Wayne L. Rev. 1005 (1970).

[13]391 U.S. 430 (1968).

[14]See Kirp, Community Control, Public Policy and the Limits of Law, 68 Mich. L. Rev. 1355, 1369-74 (1970). Although he argues that even in the context of *de jure* segregation the preservation of the right of the individual minority child to attend an integrated school if he so chooses should preserve the constitutional integrity of community control, his distinguishing of *Green* is far less persuasive than in the *de facto* segregation context.

[15] 93 S.Ct. 2686 (1973).

[16]407 U.S. 484 (1972).

[17]407 U.S. 451 (1972).

[18] In *Wright*, the court rejected a "dominant purpose" standard in judging the creation of school district lines which had the effect of increasing racial isolation. The court indicated, at 470:

"We hold only that a new school district may not be created where its effect would be to impede the process of dismantling a dual school system."

L.A. Decentralization with Promise

by Jerry F. Halverson

The period from the late 1940's through most of the 1960's was a boom time in Los Angeles. Opportunities and growth in basic industries and glamour fields were wide open. Bright prospects for the future seemed to abound; there was a sense of metropolis coming of age.

For the Los Angeles Unified School District, these were also good times. There was a virtually unquestioned premise that good education led almost directly to a better life. And the more vocal citizenry assured itself that its schools *were* good, that they offered the kind of academic and social direction most parents desired.

The waning of the 1960's brought these assumptions into question, and some of them did not hold up well under scrutiny. The space of a few years exhibited well publicized decreases in academic achievement test scores, serious budget deficits requiring program cutbacks and a retreat from the belief that education was the answer to society's shortcomings. Demands for greater control over public institutions increased; minority ethnic communities in particular demanded that education be more reflective of their personal and group aspirations.

As public expectations expanded, criticism of the education system began to be directed at the district's overall administrative organization as much as at the staff actually working in the schools. Many teachers and administrators also became dissatisfied with the system that had previously appeared to work so well.

Momentum for Change

Critics of the education system were pointing out faults in the generally centralized operation in the Los Angeles schools that were already being investigated by the system itself. There had been staff studies on the prospect of school decentralization in the 1960's. One particularly notable study was completed in 1970 under the direction of then Assistant Superintendent William Johnston. It recommended a number of reforms that would create a more flexible system to deal with the growing and varied needs of students, and would permit a greater leeway for local adaptation to these needs. In short, the study recommended a decentralization of instruction, curriculum, and management.

> The essence of the new approach [the report said] is to encourage the creation and exercise of more options within the district:
> — Options for the Board of Education in application of resources within the existing tax structure.
> — Options for the local school in deployment of internal resources and in seeking instructional resources beyond the classroom and campus.
> — Options for teachers and administrators in curriculum planning.
> — Options for pupils in terms of when and where they learn.
> — Options for the community to supplement the basic program offered in the school.

The report concluded: "Perhaps the most critical question to be answered in the 1970's is the capacity of our institutions to provide for their own reform and renewal."

This report, in combination with other proposals, led the Board of Education to a major break with precedent in Spring 1970. It

Jerry F. Halverson, former Legal Counsel to the Los Angeles Board of Education, is now Associate Superintendent of the Los Angeles Unified School District.

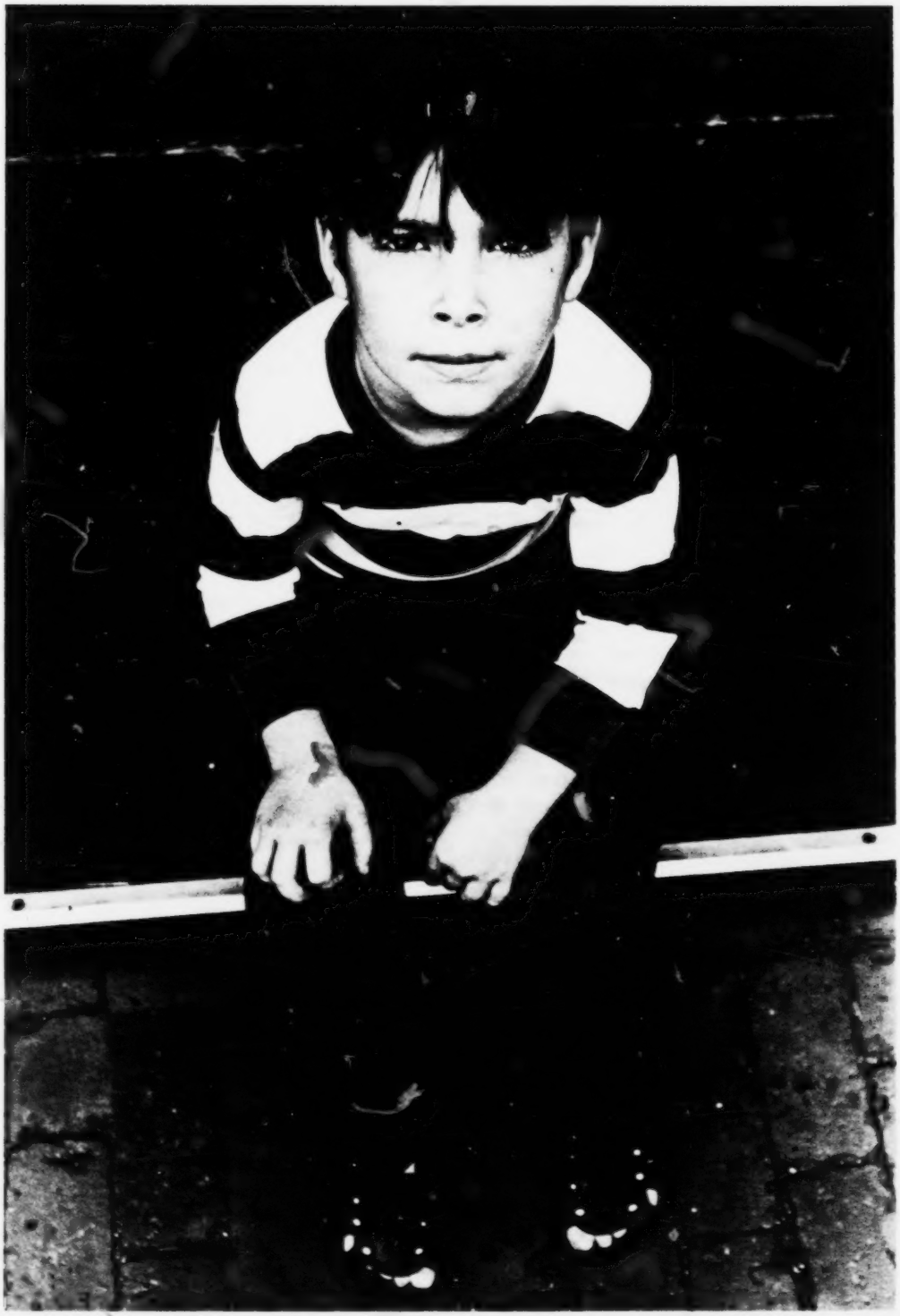


Photo by Deborah Feingold

ordered the system divided into four zones, each headed by a local superintendent. It also enacted the end of the long-time division of the system into separate elementary and secondary operations.

These were not the only or the most distinctive proposals for change that emerged. Some people called for local community operation of each school; another plan envisioned the breakup of the school system into 12 or 24 separate governmental jurisdictions each with its own governing board and system of operation. The issue of school decentralization became a subject of controversy.

In this setting, Dr. Johnston's name appeared again, this time as the chairman of a task force appointed by the Board of Education to study decentralization, determine the public's sentiment and recommend a new course for the school system. After three months of study and a survey of 750,000 citizens and educators, the task force urged a series of 26 critical changes. Chief among these were:

- Further dividing the school system into 13 local units or areas.
- Enlarging the Board of Education from seven to 11 members.
- Reorganizing top administration of the school system.
- Delegating to each school the responsibility for determining its curriculum offerings, staff and school-day organization.
- Establishing funds to support innovative practices and a speed-up of ordering classroom supplies.
- Establishing more representative parent and citizen organizations at schools.
- Reducing and relegating certain central administration and support functions to field locations.

Thus, in many respects, the task force recommendations went considerably beyond the hopes and demands of many decentralization proponents. Their scope, in fact, drew opposition from many parents who preferred a more gradual process of decentralization. Nevertheless, with the exception of the legally difficult reorganization of the Board of Education, all of the task force's major recommendations were ratified by the school board. A few were passed with modification. For instance, after considerable public discussion, 12 area units were established, rather than the recommended 13.

The Process of Reform

In overseeing these changes, Dr. Johnston, now the superintendent of schools, emphasized that decentralization had to be understood as a continuing process. That statement served as an accurate precursor of things to come. The recommended reforms went into effect gradually during the course of the 1971-72 school year. Some of the changes required more funds than expected from an already seriously troubled school budget; others had to wait for the passage of enabling legislation in the state capital.

Throughout the process of recommendation and implementation, there was a distinct sense of changing times in the school system. Long-stable business and support functions found themselves bent to more closely reflect the changing operation of the educators and pupils they served. Teachers and principals began to discover that the number of "can't do" rules had decreased to a few; they also had additional responsibility, authority — and accountability — thrust upon them. Doors opened to parents and other citizens who wished to have a part in the operation of their schools. For Los Angeles, 1971-72 was a dynamic year.

During that spring, another staff-community task force was appointed to report on the implemented changes and to suggest further reforms. The group reported in May 1972 with evidence of improvement in many aspects of the school system. It also presented further proposals for more local school independence in planning instruction, and for tighter rules to guarantee democratic community representation at the school level. The Board of Education approved recommendations of both proposals.

The beginnings of reforms and reorganization studied by the 1972 group have continued to develop. Some ideas, however, have fallen by the wayside. For instance, there are no experimental administrative areas as recommended in the 1971 report. Instead, reforms meant to create such experimental areas have

been generalized to all schools. The Board of Education still has seven members, but operating through the newly decentralized administrative organization, it appears to offer good representation to all segments of the city.

As this article is written, a third study group is completing a second-year analysis of the effect of decentralization. Although its findings are not complete, they are expected to provide further corrective suggestions rather than another major overhaul.

An interesting aspect of all three studies of decentralization has been the emphasis on surveying attitudes and suggestions of the public and teaching staff. The experiences of other cities demonstrate the serious dangers of enacting reorganization and reforms which lack community and teacher support. The surveying also identifies weak or poorly functioning activities where change is particularly needed as well as activities which maintain enough popular support to work.

So far the success of the decentralization efforts validates this survey approach. In only three years, the second largest school system in the nation has been reorganized, has significantly shifted its principal responsibilities to a local level and has opened its structure to greater participation by the public. Change has occurred with serious and often heated debate, but without a harmful division of the community or political structure and without negative effect on the school population.

Ongoing Progress

What has been accomplished? Where do the Los Angeles schools stand and what has been gained in the three years since decentralization began? The District seems to have made good progress in the following key areas:

1. Responsibility and authority have been greatly decentralized to the local school level (or, if impractical there, to the next more central level, the local administrative area office). Schools now choose their own textbooks, determine their own school-day and staff organization, initiate new courses and curriculum, and establish their own goals and priorities. For example, in a new $10 million reading program, each school cooperates with its community to determine the preferred reading program, and spends its allocation independently.

2. The structure of the school system has been opened to all who wish to participate. Rules guarantee the democratic election of community advisory councils at each school, and there are more than 12,000 council members. Others serve as advisers on curriculum and instructional matters, "block safety" parents, tutors and in many other capacities.

3. With the localization of authority, the schools have acquired a considerable degree of flexibility in their approaches to education. Projects involving schools-within-a-school, multi-school designs, extra-classroom programs and community education projects are now carried out at the option of school staffs and parents. Over the last two years, parents have planned and proposed new alternative schools in Los Angeles; seven of them are now in operation. The superintendents of the 12 administrative areas have funds to be allocated for local projects of their choice. This year, in addition to the regular supplies budget, teachers have a $50 personal classroom supplies fund to spend as they desire.

For the first time in four years the system has funds to make program improvements. Teachers, parents and other citizens were widely surveyed to determine their preferences in four major budget areas. The Board of Education implemented each of the indicated top choices.

4. A number of former artificial divisions have been erased. There no longer are separate organizations for elementary and secondary education with separate plans and priorities. Administrators have responsibility for all education within their sector of the city; curriculum planners must provide for a linked program with continuity. Some children take part of their instruction in advanced grade levels at another school, and we are finding ways to allow high school students to take classes at off-campus locations formerly available only to adult education students.

Perhaps equally important in the long run is the developing belief that new plans and different methods are welcome in the Los Angeles Unified School District. In the spirit of decentralization, any reasonable program may be given its change.

L.A. Decentralization with Problems

by Kay Gurule and Joe Ortega

> Decentralization has turned off hundreds of parents who were active in making the schools more responsive to the needs of the local communities, and who, ironically, were in large part responsible for bringing decentralization into being.

That is the view of one parent who had been very active in trying to get schools in the large Chicano barrios of Los Angeles to recognize some of the special skills and special needs of those neighborhoods.

A unique type of decentralization came grudgingly to the huge Los Angeles Unified School District (613,000 pupils, 710 square miles), partially as a result of the demands of people like the parent quoted above, but more specifically in response to other compelling demands. In 1968, pupils from the predominantly Mexican-American high schools walked out of what they called their "prisons" and sat-in at the Board of Education offices. Over 6,000 minority students presented 36 demands to the Board. In 1969 the California Superior Court ordered the district to integrate its *de facto* segregated schools in the case of *Crawford* v. *L.A. Board of Education*. In 1970 the California Legislature passed a bill which would divide the district into ten separate districts; the Governor vetoed that legislation. Other school districts in the state were decentralizing (with varying results), many without the support of school administrators. The handwriting was on the wall.

Kay Gurule is a Commissioner on the Mexican-American Education Commission. Joe Ortega is an attorney at Los Angeles Neighborhood Legal Services.

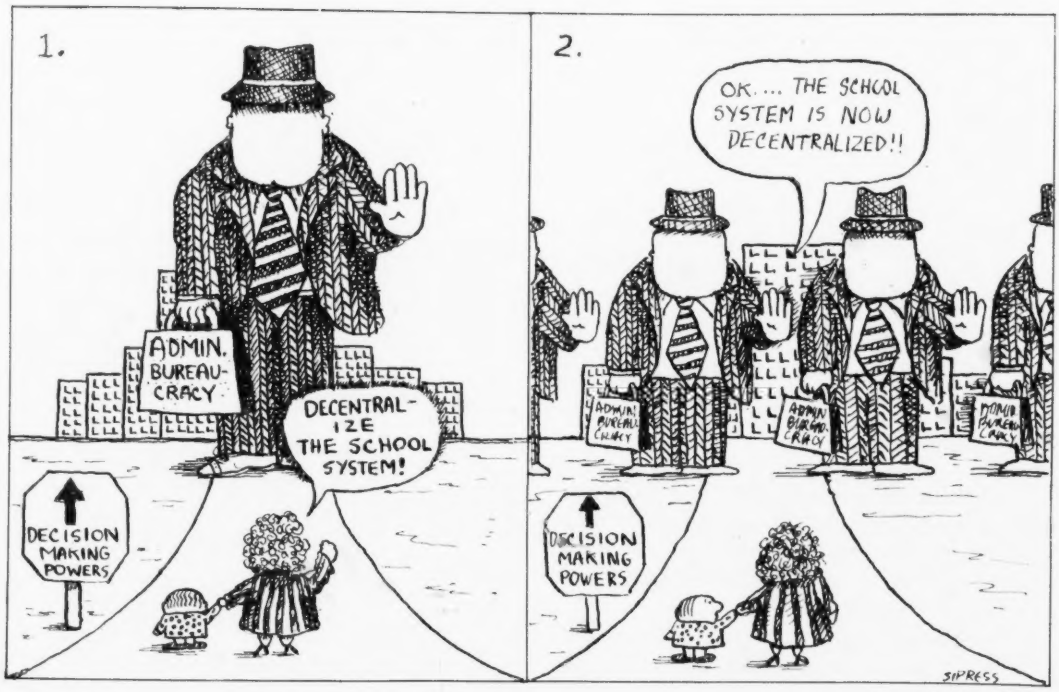
During the period 1968 to 1971, the district tried to meet demands for parent participation in the schools' programs by mandating Advisory Committees for each school. These committees, made up of local volunteers, were supposed to provide community input for school decisions. The committees soon found, however, that recommendations for any change of consequence were turned down by the principal on the grounds that those decisions could only be made by the superintendent's staff.

Decentralization — Los Angeles Style

Basically, decentralization divides the Los Angeles Unified School District into twelve administrative areas named, in the imaginative manner of school administrators, "Areas A through L." (Los Angeles has community names such as El Sereno, San Pedro, Hollywood.) Each area has its own administrative offices headed by an Area Superintendent, and theoretically has control over its own budget. In addition, each school is required to have a Community Advisory Council to advise the principal.

The major criticism (and the ironic flaw) of the plan is that, in effec' 'ds an *additional* layer to the bureaucra_y through which citizens must wade to get to the Board of Education. Decentralization as it functions in Los Angeles is a creation of the Board of Education and the Board claims that it cannot legally delegate its authority to others. Consequently all important decisions still have to be made "downtown."

What are the important decisions that the local community wants to participate in? Very simply, they want to have a say in teacher selection and placement, in drop-out preven-



Cartoon by David Sipress

tion, in selecting the curriculum and teaching materials and in determining student rights and responsibilities. Rather than advising or voting on limited options offered by the central administration of the district, the community wants the ability to determine what these choices are to be. In both budgetary and curriculum decisions, the local advisory board and parent options do not extend to major programmatic policy. That is the very stronghold of authority the School Board says it cannot relinquish and without which local communities are powerless.

When a parent *does* appear before the Board, he/she tends to be awed by them and distant from them. Since the Board consists of seven politicians elected from a constituency of about 3.3 million persons, board members cannot be on a familiar basis with a very high percentage of their constituency. Further, because of the enormity of their task, the Board members must and do rely extensively on the Superintendents' staff. Although board members and administrative staff may be conscientious men and women, they make most of their decisions on the basis of recommendations from the bureaucracy, not from the decentralized communities or the Advisory Committees. One parent described it less charitably when she said the Board members were captives of the bureaucratic hierarchy.

In the view of many community people decentralization as practiced in Los Angeles is not in fact decentralization at all, but merely a pronouncement of it. For community people decentralization will only be effective when large districts like Los Angeles are broken down into smaller districts, when each district has the power to elect its own board, and each board has the power to make its own decisions.

The Education Task Force in Detroit

by Luvern L. Cunningham

The educational problems of American cities are enormous. So are the problems of health, housing, crime and jobs to name a few. Can they really be solved? What does it mean for domestic problem solving when the United States is becoming a slow growth or "no growth" society?[1] Many people seem to have abandoned the big cities to further deterioration and waste-filled futures.[2] But not Detroit, especially not in education.[3]

In the early decades of this century, the Detroit Public Schools, like those of other large cities, developed model education programs. Detroit's organizational plans and curricula were imitated in many other communities. But urban blight, so visible in the physical environment, became manifest in the schools. The city's educational institutions, at one time a source of community pride, became the object of public concern and frustrations. Credibility ebbed away as public confidence turned into hostility; responsibility for general social ills was heaped upon the schools. The citizens of Detroit began to refuse to support its public school system.

In 1972, therefore, the Detroit Board of Education was frustrated in its attempts to solve its financial, managerial and educational problems. The Board decided to create a citizens' group to help with these problems and to improve public feeling about the schools. In mid-October, the central Board adopted a resolution which authorized a new experimental citizen effort called the Education Task Force (ETF).[4] The Task Force was to be and is distinguished from other citizens' groups in three important ways. First it addresses its efforts to problem solving, not just study, analysis or the advancement of recommendations. Second, it does not restrict its efforts to recommendations to the Board of Education, but also makes recommendations to the state legislature, administrative arms of state government, school government at the local level and administrative arms of local governments (the police and the courts). Third, the Education Task Force approaches problem solving serially. It defines discrete, manageable problems that fit into a larger set of problems and works on them. The Task Force mission does not stop there, however. It makes certain that adequate implementation occurs and assists with implementation wherever its efforts can ensure improvements. The ETF wants to ensure that things will happen since solving problems is its dominant objective. Task Force members are familiar with the history of other Detroit citizens' groups. They've read their reports. In fact, some of the members of the Task Force have served on other Detroit citizens' groups. So, they know first-hand the frustration of unfulfilled expectations and they want no more of it.

Luvern L. Cunningham was Dean of Education at Ohio State University and is now Executive Director of the Education Task Force of the Detroit Central Board of Education.

Task Force Organization

Crucial to the effectiveness of the ETF is the question of its organization — leaders, members, committees and committee chairmen. The Board of Education decided that the Task Force should be headed by co-chairmen. The Task Force then chose to distribute its 57 members into three working committees. One group obviously had to work on finance since at that time the schools were about to close because of lack of state and local support and

funding. A second group was assigned to educational organization, management and leadership. The third was to work on the problems of the classroom: the questions of teaching and learning, the issues of education in a large city with special emphasis on the problems of the poor and disadvantaged. These are old problems — unglamorous, difficult and unyielding. Yet they were there and had to be dealt with.

The complex issues of both the Task Force and the committees demand leaders with outstanding track records both in public service and in their own professional or occupational pursuits. The ETF Co-Chairmen and the leaders of each of the Task Force's three committees have such records. They are well known in Detroit and the Metropolitan area. Indeed, they are well known and respected in the state Capitol, which for many aspects of the Task Force's work is essential (e.g., achieving changes in legislation regarding school finance).

The Task Force Co-Chairmen, the Chairmen and Vice-Chairmen of the Committees and three at-large members form the ETF Steering Committee, which is the vehicle for fashioning general Task Force direction and making basic choices about priorities.

The Task Force recognized early that it also needed a professional staff to organize and supplement the activities of its voluntary membership. This small staff consists of the Executive Director, the Deputy Executive Director (who also serves as coordinator of the Education Committee), and a liaison officer with the school system. Additional staff services are provided by three interns from the University of Michigan, five Fellows from the National Program for Educational Leadership and secretarial personnel.

The advent of this professional staff necessitated fund-raising. Task Force leaders insisted that the problem solving philosophy of ETF be reflected in its funding. With that in mind, it decided that most of the support should be local. Local foundations, businesses and industries have provided one third of the dollars needed to carry on the work of the Task Force. Another one third has been contributed by businesses and industries in the form of staff help. Chief among those is the Citizens Research Council, a private non-profit research group which up until this year had worked essentially in public sectors other than education. They did a large portion of the research and staff work on finance and organization management and have contributed over $100,000 in staff time. The other one third of ETF support is from the Ford Foundation.

After the Task Force was underway, the full range of leadership requirements became more apparent. One requirement is the ability to influence the substance and the process of legislation affecting Detroit. Another is retaining the support and confidence of the Detroit Board of Education and the school administration in the work of the Task Force. Still another is to sustain the support of Detroit's leadership, especially New Detroit, Inc. and the businesses, industries, and local foundations which have invested resources in the work of the Task Force. And of like significance is winning and keeping the support of the grassroots. This is the most difficult leadership requirement of all.

Within the Task Force, the leadership cadre must enlist and sustain the participation of its membership. The work of the Task Force must be organized well, deadlines must be established and maintained, and sustained attention must be given to information feedback needs across the large and heterogeneous Task Force membership.

Advisory Committee from Higher Education

The Task Force Co-Chairmen have also sought the assistance of nearby colleges and universities. An Advisory Committee from Higher Education (involving more than 20 institutions) was formed, chaired by the president of Wayne State University. A small steering committee stays in close communication with the Task Force. "Institutional Coordinators" have been named by several institutions to work internally in the mobilization of resources helpful to the Task Force mission.

The institutions of higher education are providing several services without charge, the time of personnel chief among these. Consultants are provided from Wayne and Michigan State Universities to work with the Task Force committees on their agendas. The

Dean of the College of Education at Michigan State University is preparing an analysis of the role of the General Superintendent in Detroit, for example.

Extensive planning is underway to coordinate the universities' research resources with the informational needs of the Detroit Public Schools. A joint committee of school system representatives and university persons is searching for ways to combine research interests. Simultaneously, attention is being given to a continuing mechanism for organizing and monitoring programs of common interest, such as pre-service professional training programs and in-service education of Detroit personnel.

Recently the higher education institutions pledged their support of the school district's plans to upgrade learning outcomes, and universities and other post-secondary institutions are searching for ways to assist the Detroit Public Schools with that critical objective. Faculty members and small committees are reviewing and critiquing an important school district report on achievement in Detroit.[5]

The institutions of higher education reflect the problem solving ethos which surrounds the work of the Task Force. The spirit of common purpose and commitment that characterizes these relationships is a marked change from earlier periods when the chasm between higher education and the Detroit Public Schools was broad.

Other Sources of Help

Communication is a universal problem. The Task Force has it in abundance. It must keep a good flow of information going among its members and to most of the publics of the Detroit Public Schools. To aid in the search for effective communication, two consultants have been provided by the automobile industry who have designed guidelines for communication and assisted with identifying professionals to help with day-to-day communication needs.

Another important form of assistance came from the Office of Education. More than $100,000 was allocated to Detroit to assist with staff development. The funds are being used specifically to train school personnel to implement the district's plans to improve achievement.

Links to the School System

As a creation of the Central Board of Education, the Task Force exists at the pleasure of the Board and strives to work in its interest, at its request. Therefore the relationship between the Task Force and the Board is reviewed from time to time.

The Education Task Force reports formally to the Central Board once each month. Informal meetings of school officials and ETF leaders have been held to ensure adequate communication. The school administration has assisted the Task Force with many of the mechanics of its operation, e.g., secretarial help, supply purchasing, etc., as well as offered the cooperation of school district personnel.

The work of a full time professional staff member of the school system assigned to the Task Force is critical to the success of the entire effort. As the link between ETF and the schools, the liaison officer shares information, alerts the Task Force to problems and issues in the schools, arranges for school staff to work with Task Force staff, keeps the superintendent informed of progress, arranges key meetings between school officials and ETF leaders, analyzes critical problems in the relationships of the schools and the Task Force and serves as a key member of the Task Force professional team.

1973, Detroit and the Task Force

When the Education Task Force began its work in January 1973, school officials were caught up in an incredible bind. The people of Detroit were saying that they would not spend any more money on schools until they saw some dramatic improvements in the learning of students. They repeatedly voted down bond issues and tax referenda. Because of reduced school enrollments and the prospect of further declines, the people argued that the number of school workers should also be reduced. Teachers and other school employees maintained that their numbers should hold firm to improve the ratio of professionals to students. They argued that they could not be expected to effect a sharp increase in the achievement of Detroit's students until there were improvements in their salaries and working conditions. And teacher benefits could not be im-

proved without more local taxes or increased state aid. The State of Michigan was saying that it would not help Detroit until Detroit provided evidence of willingness to help itself. Conditions were tense; it was a standoff. Meanwhile, the education of more than a quarter million students hung precariously in the balance.

Thus, when the Detroit Board of Education faced the prospect of closing the schools in March 1973 because of lack of funds, the Education Task Force initially zeroed in on locating ways to keep the schools open for the full 1972-73 school year. Along with representatives from the Board of Education and other members of the Task Force, the leaders of the Education Task Force Finance Committee were able to design legislation to avert the large-scale fiscal crisis pending during the winter. With the help of Task Force members who are state legislators, the representative of the Governor of Michigan and other administrative and legislative leaders in the State Capitol, they were able to have emergency legislation passed in which the state gave money to ease the school system's fiscal difficulties.

This is one example of the ways in which the Task Force works. There are many facets of the changes which account for or contribute to the problems of the education system in Detroit and the priorities of the Task Force. The racial makeup of the city, for example, is changing and Detroit is rapidly becoming a majority black city.[6] In 1910, there were 5,741 blacks in the city — one percent of the total population. By 1960 blacks comprised nearly 30 percent, and in 1970, the percentage had grown to more than 44. Today school enrollments are approximately 65 percent black and 35 percent white and other minorities. While the overall enrollment figures continue to decline, the percentage of blacks in the schools continues to grow.

Because of the population changes in Detroit, segregation is a particularly significant issue. The citizens live in the shadow of uncertain court determination on their segregation problems. The celebrated Roth decision of June 14, 1972 established tentative boundaries for a metropolitan busing plan.[7] It was to cover Detroit and 52 separate suburban school districts. A plan was submitted which would incorporate nearly 780,000 students into a single attendance unit. A three-judge panel of the U.S. Sixth District Court of Appeals unanimously upheld the Roth decision in December 1972. In June of 1973 the full membership of the Sixth Circuit reaffirmed the principle of Judge Roth's decision, by a vote of 6 to 3, but also ordered additional proceedings in the trial court with respect to suburban districts participating in the plan. (Several suburban school districts had not appeared to make their objections in the trial court.) The case will be reviewed by the U.S. Supreme Court in all likelihood. Meanwhile the people of Detroit and surrounding suburban districts, school officials, civil rights leaders and the lower courts await further action. The lack of clear direction hangs like a pall across the metropolitan area and in one way or another affects many other decision arenas of educational significance.

Decentralization is another crucial issue in the Detroit Public Schools. In 1970 the Detroit Public Schools were decentralized by Public Act 48 of the Michigan State Legislature. The membership of the Central Board of Education was expanded. The district was divided into eight regions, each with its own five member board. The Central Board is composed of the chairman of each of these eight regional boards and five members elected at large. The 1973 Central Board has six white and seven black members and a black chairman, making it the first Detroit Central Board with a majority of black members.

Decentralization has been very controversial in Detroit, but the regions are assuming more power. The division and transfer of functions and responsibilities from the central administration is proceeding.[8] The shifts required have been slow and painful, but they are continuing.[9] Despite apprehensiveness on the part of many citizens and school officials, it appears that decentralization in Detroit is working (although creaky at the joints) and will go on for some time. The full benefits of decentralization have not been realized in large measure because the District lacks the dollars to effect first-rate services and programs.

The Task Force and Change

In a setting as pluralistic as Detroit effecting change is difficult. The destiny of the

school system is linked to the city and state, and to a lesser extent to the federal government. The fate of the schools turns on an endless number of events in the private sector too. Will Chrysler or General Motors forsake Detroit and move to new locations? Will the State of Michigan build a large new state office building in downtown Detroit? How will Wayne State University fare in Lansing in its requests for urban program support? And inside the school system there are constraints which inhibit change.

Formal school authority exercised through the Board of Education, Regional Boards, and the school district's administrative system coexists with several other "authority systems." They are the unions. Several unions bargain directly with the Board, the most powerful of which is the Detroit Federation of Teachers. The teachers in Detroit take their cues from the head of the union seemingly even more than from the superintendent, regional administrators or principals. The aggressiveness of the unions has made them nearly untouchable.

Teachers' Strike

The Detroit Public Schools did not open as scheduled on September 5, 1973. They were struck by the Detroit Federation of Teachers. More than 270,000 pupils were home or on the streets. Injunctions were sought first by the school administration, later by parents, against the Detroit Federation of Teachers. But the schools remained closed for days. The Court ordered the teachers back into the classroom on September 25, but teachers defied the order. The teachers argued that the school administration and the Central Board had failed to bargain in good faith, a point which the Court supported to some extent. The chief points of difference that produced the strike were salary, class size, and the insistence of central administration and the Central Board on some guarantee of teacher accountability.

The strike generated bitterness that was citywide. The Governor, the State Superintendent of Public Instruction, New Detroit, Inc., the Education Task Force and hundreds of parents joined in urging the teachers to return to the classroom as they simultaneously urged representatives of both sides to return to the bargaining table. But the prolonged debates drove wedges between the teaching force and school management.

The September school strike provoked large scale citizen response. Noisy delegations packed regional board meetings as well as sessions of the Central Board. Pickets, including students, circled the School Center Building mingling with teacher pickets who daily walked the streets in front of the Board of Education headquarters. Police and school district security officers were called on several occasions reminiscent of the more turbulent late 1960's.

The Task Force Track Record

Citizen involvement in these times must go somewhere. There have to be visible achievements. Otherwise, why continue? Task Force members are very sensitive to their progress.

After the initial financing crisis in early 1973 was over, the Finance Committee concentrated on improving internal financial management of the school system. A new fiscal officer was employed, comparable to a comptroller. Balanced budgets were constructed in compliance with the special legislation that gave the districts temporary fiscal relief. A new budgetary process was designed and a new fiscal information system was created. In September of 1973, the district had these in operation. The Finance Committee is now concentrating on longe-range finance needs, anticipating a potential constitutional change in regard to state financing of education.

The Organization and Management Committee produced a strong set of recommendations for central and regional administrative reorganization. Many of the principles of organization have been accepted by school officials. This committee has examined several previous management studies of the district and endorsed recommendations from them to the Board and school administrators. Staff from the Citizens Research Council produced a detailed publication which delineated the responsibilities between the Central Board of Education and Regional Boards of Education. At present, the Organization and Management Committee is concentrating on the analysis of local building-level administration. Data were

collected through questionnaires from more than twelve hundred administrators and supervisors regarding their current ways of performing as well as their preferences for administrative and organizational improvements. Regional leaders and other key school officials were interviewed to provide the bases for recommendations already advanced as well as those yet to come.

The Education Committee is at work on problems of counseling and guidance, problems of severely alienated youth, the implications of Cable TV and advanced information technology for the future of education in Detroit, and needs of young people for career and occupational education. The current problem regarding teacher accountability is on the agenda of the Education Committee as is the most fundamental educational problem in Detroit, the improvement of learning outcomes. The Education Committee strongly endorsed a recent school district plan to improve achievement.[10] The entire work agenda of the Education Committee — indeed, the Task Force itself — is devoted to this objective.

Frustrations of Participation

The domestic programs of the 1960's often required forms of citizen participation as a condition of receiving federal monies. The Office of Economic Opportunity and the Office of Education each prepared guidelines requiring participation. These stipulations produced a near revolution in the range and types of lay persons involved in education.

At the same time involvement was expanded in response to federal policy, many other new forms of citizen participation appeared.[11] These ranged from neighborhood action groups, which were often *ad hoc* and short-lived, to "blue ribbon" groups distraught with the ineffectiveness of the schools and determined to affect educational improvements. Citizen reactions to their own participation in school affairs ranged between exhilaration and despondency. Some people found substantial personal satisfactions in participation. Involvement was satisfying their needs even when their participation was not producing educational improvements. Others were deeply disappointed when there was no visible consequence of their work. Such experiences embittered them and intensified their beliefs that schools, educators, and even new programs which they had helped design were going nowhere.

Photo by Mark Harris

It is evident that although citizens react differently to their involvement, some common observations about participation can be made:

1. Participation is hard work and demands considerable time and personal sacrifice.
2. People who become involved soon discover how complex problems are and realize that there are no easy solutions.
3. Some people who were antagonistic toward schools become strong advocates for the "establishment" after periods of involvement.
4. Adequate genuine representation of all citizens is a serious problem.
5. Work processes of groups that have diverse membership are slowed as remarkably diverse people encounter one another.
6. Many efforts at participation proceed within climates of suspicion, especially in regard to teachers and school administrators.

Participation in Detroit in 1973 still reflects some of these reactions. Task Force members have discovered that there are no easy solutions. School officials still vary in their abilities to work with the community. There were some suspicions surrounding the Task Force in the beginning, but many of these appear to have dissipated.

In the Task Force experience to this point, it is clear that interests and expectations about participation vary substantially. Conventionally defined influentials (white and black) want to participate selectively. They resist spending time on lengthy debates about points which appear to them to be obscure, marginally important, or the type of issue that professional educators should decide. The conventionally defined "grass roots" Task Force members (white and black) want to examine issues in depth, debate over them if necessary and seek a clearer understanding. Simultaneously, they resist inferences that the Task Force would be better off if it turned educational matters over to educators. It is also apparent that some Task Force members are uneasy about making decisions in areas which they believe require substantial expertness. Where such uneasiness surfaces, there is an accompanying desire to turn certain matters over to educational specialists, either members of the Task Force professional staff, Task Force consultants or school system personnel.

The most difficult participation problem the Task Force has faced is to adequately identify and include the interests of students and community people. The city is large; the population diverse. How can the sentiments and preferences of students and the community be identified? The Task Force is partly tied to the community through the representative nature of its membership. Contacts with community leaders, essentially through the regional organizational structure of the school system, is another link, as is attendance and participation at community meetings. But these are inadequate and hardly touch student interests at all. Considerable work must be done to expand and intensify relationships with students and community people.

The Task Force tries to remain simultaneously close to and remote from the Central Board. It must be close enough for good and easy communication to retain the Board's confidence. It must be removed from the Board to avoid the image or reality of cooptation. Considerable attention is required to sustain this relationship.

The needs of education for the future are as significant as those in the present. To some extent they are more important, given society's very limited ability to plan for and anticipate future social needs. A focus on the future for the Task Force has been very difficult to maintain. Problems of the moment consume the time and interests of everyone. Although the Task Force professional staff has not identified the answer, it is continually aware of the dimensions of the problem. The future seems to exceed the present in terms of its complexity. Failing to comprehend today's complexity, Task Force members and staff are not well prepared to plan definitively for what may be ahead.

Some problems produce impotence. Two major problems have not been faced. Each seems so involved and apparently insolvable that they are avoided. One is segregation; the other is collective bargaining and its implications for learning. Both could be defined as matters of central interest to the Task Force, but so far they have not been.

In Conclusion

This article began with a reference to the experimental nature of this citizen effort. It may succeed; it may not. If it fails, it will not be for the lack of dedication or effort. If it succeeds, it will do so on the strength of the membership of the Education Task Force. In some measure, the problem solving design may help it toward its objectives. The problems are awesome, but they won't go away. If they are to be solved, the solutions will be found by caring people working on problems where the problems are.

Footnotes

[1] The concept of slow growth or "no growth" is startling to many Americans who have internalized beliefs and behaviors based upon growth. Population explosion, rapidly expanding G.N.P., more schools, more colleges, more consumer goods, more of everything have dominated American thinking and planning. Now we face the prospect of a rapid turn around, and few are prepared to think in such terms. The arrival of no growth struck the Detroit Schools with dramatic effect. Enrollments are going down, and state aid with them. Fewer teachers and administrators are required. Some school buildings may be phased out. For a good overview of the problems of growth see *Daedalus*, Vol. 102, Fall 1973.

[2] A leading possessor of this point of view has been Edward C. Banfield. He has mentioned that the problems of the cities are largely insoluble now and will be for the near future. The appearance of *The Unheavenly City* shocked and angered many, including the tenacious reformers who believe that patience and rationality will prevail, allowing the cities to emerge as attractive, satisfying places for large numbers of people to live.

[3] Detroit suffered some of the nation's harshest social unrest in the mid-60's. The Detroit riots in the summer of 1967 surprised and startled community leadership. One response was the establishment of New Detroit, Inc., whose Board of Directors list reads like a "Who's Who of Leadership" in Detroit, including grass roots, racial and ethnic representation as well as the traditional white influentials.

[4] The Education Task Force met for the first time on January 4, 1973. Superintendent of Schools Charles J. Wolfe on that occasion stated the general purpose of the Education Task Force to be ". . . to help determine methods to strengthen public confidence in the Detroit Schools so that adequate financing and other support will be provided on a continuing basis to assure the delivery of quality educational services." Superintendent Wolfe proposed the Task Force idea to the Central Board of Education in October 1972.

[5] A major school district committee produced this document. It was chaired by Dr. Stuart Rankin. It is entitled *Report of Superintendent's Committee on Achievement* (Detroit: Detroit Public Schools, March, 1973).

[6] An excellent case study of race in Detroit appeared recently. Joel D. Aberbach and Jack L. Walker, *Race in the City* (Boston: Little, Brown and Company, 1973). Another relevant review of segregation problems as they affect school district organization is Frederick M. Wirt, "The Urbanization of the Suburbs," *Urban Affairs Annual Review*, Vol. 7, 1973.

[7] See generally *Bradley* v. *Milliken*, 338 F. Supp. 582 (E.D. Mich., 1971), aff'd, — F.2d — (C.A. 6, June 12, 1973) (en banc). The Court of Appeals opinion gives a complete history of this complex litigation.

For a brief but well done overview of several school desegregation court decisions see John C. Hogan, "School Desegregation — North, South, East, West: Trends in Court Decisions, 1849-1973," *Phi Delta Kappan*, Vol. LV, No. 1, September 1973, pp. 58-63.

[8] An early product of the work of the Education Task Force was a publication entitled *The Division of Responsibilities Between the Central Board of Education and the Regional Boards of Education, Detroit School District*, prepared for the Organization and Management Committee, Education Task Force of the Detroit Central Board of Education by Citizens Research Council of Michigan, June 1973.

[9] For a brief analysis of decentralization see "Report and Recommendations of Organization and Management Committee to the Steering Committee and Education Task Force of the Detroit Central Board of Education on Central and Administrative Organization, and Relationships Between the Two Bodies," Education Task Force, 218 Park Shelton, East Kirby at Woodward, Detroit, Michigan 48202. A more comprehensive analysis of Detroit school decentralization has been completed recently. See James House, *An Assessment of Decentralization in the Detroit Public Schools* (Detroit: New Detroit, Inc.), 1973.

[10] The Task Force has a unique resource provided (without charge) through the Mershon Center at The Ohio State University. It is a Detroit Decision Seminar. Twenty-five faculty and staff members from several colleges and departments of the Ohio State University meet every other Monday for one-half day. The group, chaired by the author, devotes its time to the problems confronting the Education Task Force. Problem analyses produced by the decision seminar participants are available to the professional staff of the Task Force in Detroit. The Ohio State group is designing "an optimum decision-making environment" which may prove helpful to Detroit (and other) policy making groups.

[11] The Status of "participation" in several large cities as of 1968 is reviewed in Luvern L. Cunningham and Raphael O. Nystrand, *Citizen Participation in School Affairs* (Washington, D.C.: The National Urban Coalition), 1968.

An Abbreviated Voucher Primer

by Thomas J. Flygare

Educational vouchers have been defined as "certificates which the government would issue to parents, parents would give to an eligible school, and the school would return to the government for cash."[1] Many plans have been advanced to implement the voucher concept. The four most widely discussed are those of Milton Friedman, Theodore Sizer, Christopher Jencks and John Coons. These four basic models differ from one another in three important respects: 1) the criteria by which they determine the value of each child's voucher; 2) the degree to which they regulate tuition charged by schools; and 3) the degree to which they regulate other aspects of the schools.

Friedman

Milton Friedman, Professor of Economics at the University of Chicago, would end direct government subsidy of public schools.[2] Instead each child of school age would receive a voucher equal in value to the average amount spent locally per pupil in the public schools. Every child's voucher would have the same value and could be used to purchase education at any school certified by the government as meeting minimum standards. The government would function in schools similarly to the way ". . . it now inspects restaurants to assure that they maintain minimum sanitary standards."[3] Public schools would continue to exist, but would presumably only offer the minimally acceptable education for which they would charge tuition equal to the voucher. Private schools would be free to charge whatever the market would bear provided it was at least as high as the value of the voucher.[4]

Friedman believes his plan will have several important benefits. Because families who want to send their children to private schools would no longer have to pay both school taxes for other children and tuition for their own, many more families would be able to take advantage of private education. To attract students, private schools would specialize and provide alternative forms of instruction, which in turn would put competitive pressures on the public schools to upgrade their teaching procedures. Furthermore, the family would control the expenditure of money and could demand the kind of education they desire, or transfer their children (and their vouchers) to other schools.

Critics of the Friedman plan suggest it would foster socioeconomic segregation in education.[5] Poor children could not supplement the basic voucher with family cash and thus would be relegated to schools charging the lowest tuition. Wealthy children, however, would not only have their parents' income to purchase exclusive private education but would have a largess from the state in the form of Friedman's voucher.[6] Another frequent charge leveled at Friedman's plan is the inordinate faith it places in private schools to cure America's educational ills.[7]

Sizer

Theodore Sizer, former Dean of the Graduate School of Education at Harvard University, suggested a voucher plan designed principally to augment the economic and political clout of poor school children.[8] His model would provide a voucher to each child whose family income was below the national average. Children from the poorest families —

Thomas J. Flygare is a Research Associate at the Center for Law and Education.

annual income less than $2,000 — would receive vouchers worth about $1500. As family income approaches the national average, the voucher value would shrink to zero. Children could spend their vouchers at private or public schools, both of which would function as they presently do. In addition to injecting some competition into the educational system, Sizer finds several benefits in this plan. With his enlarged voucher, the poor child would become a desirable client of the schools rather than an unwanted burden. Moreover, this plan would guarantee that aid for disadvantaged students went to the schools those children actually attend.

Sizer's model has been criticized for creating the illusion of competition. How could a private school, receiving only the voucher as income, compete with public schools receiving the voucher *plus* the public subsidy? In addition, it has been suggested that political pressure might force legislatures to reduce the difference in value between a poor child's and a middle class child's voucher, thus eventually arriving at a system like Friedman's.[9]

Jencks

Another voucher proposal has been advanced by a group headed by Christopher Jencks, Associate Professor of Education at Harvard.[10] Under the Jencks plan, each child would receive a voucher roughly equivalent to the per pupil expenditure in the local public schools. Schools, public or private, would be required to accept each child's voucher as full tuition payment. However, a school could earn extra income from the government by enrolling children from disadvantaged backgrounds or with special educational problems. A school would be required to accept all applicants unless applications exceeded capacity. When applications exceed capacity, a school would have to select half its entrants at random from the applications. The other half could be admitted on other criteria but would have to be racially representative.

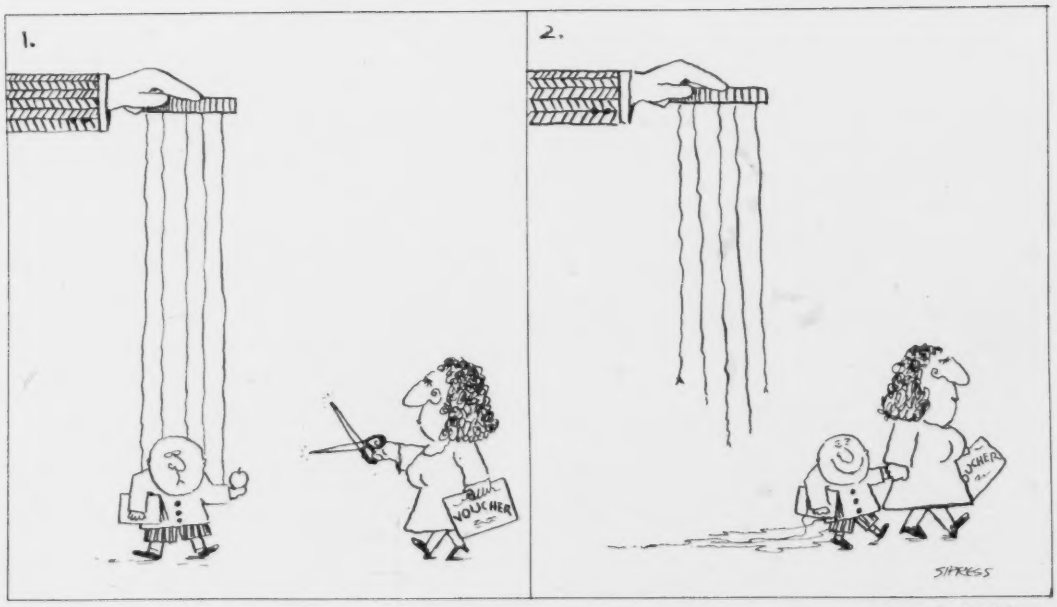
Jencks foresees several important changes in education stemming from his voucher plan. First, it would lead to higher levels of spending for education in general and for poor children in particular. Second, he believes that schools would become more racially, economically and academically mixed if financial and geographical restraints on educational mobility were lifted. Finally, he sees a variety of schools springing up to meet the diverse educational needs of urban areas.

The principal objection to the Jencks plan — officially termed the "Regulated Compensatory Model" — is that a poor child would be faced with an educational decision characterized by two extremes: he can choose a school primarily populated by other poor kids, and therefore a high expenditure school, or he can choose a predominantly middle upper class school which will be, according to the Jencks formula, a low expenditure school. Of course there would be a variety of schools between these extremes, but this would not change the basic problem: a poor child could get high expenditures *or* lots of socioeconomically advantaged classmates, but he wouldn't get both!

Coons

John Coons, Professor of Law at the University of California at Berkeley, introduced his voucher plan on the pages of this magazine in 1970.[11] "Family Power Equalizing," as Coons calls his model, represents a major departure from voucher concepts discussed above. In each urban area with population exceeding 200,000, the legislature would require four categories of public schools. Each category would have a different level of expenditures — the lowest at about $800 per pupil, the highest at about $1700. Any private school joining the program would be required to establish a spending level fitting one of the four categories. Determining which level a child could attend would depend on the financial effort in relation to income that a family would be willing to expend on education. For example, a poor family may have to pay $5 to allow its children to attend the lowest spending school (Coons believes every family ought to pay something) and $25 to attend the highest spending school. In contrast, a wealthy family would have to spend perhaps $1600 to allow its children to attend the low spending school and $3400 for the high spending.[12]

The principal advantage of Coons' plan is that it provides significant family self-determination about the education of its children. The amount of money spent on a



Cartoon by David Sipress

child's education would not be determined by the local property tax base, by current per pupil expenditures nor by the family's income. Rather, it would be determined by the financial effort relative to income that a family is willing to make. The ability to choose schools and to pursue particular educational goals could have an important cohesive effect on families.

The Coons model has been criticized because the quality of a child's schooling would depend on his parents' spending priorities. If his parents placed little value on education, the child would attend the low spending school. Critics suggest that children whose parents rank education low in their priority system are precisely those who need better schools.[13] Thus, children who need the best education might be clustered in the "worst" schools, and children whose parents demonstrate a real interest in education will be concentrated in the better schools. This result, the critics conclude, will exacerbate the cleavage between good and bad schools in this nation.

Overriding Issues

Although each of the major proposals has advantages and flaws, two overriding issues are relevant to any voucher plan. The first is the extent to which vouchers may promote racial and socioeconomic segregation in the schools. It is difficult to accept the argument that free choice alone will result in more diversified student enrollment patterns.[14] This argument overlooks the power of intimidation and fear to inhibit free exercise of choice. Yet statutory and administrative safeguards to prevent racial isolation within the voucher system are not necessarily promising either. First, will legislatures adopt such safeguards? Would the cost of insisting on these safeguards be the defeat of the voucher concept?[15] Second, even

if adopted, will the safeguards be enforced? And by whom? Finally, how strong can statutory and administrative safeguards be without destroying free choice, the very essence of the voucher theory?

Another major concern is the church-state issue. Voucher advocates have always been caught between the desire to attract the considerable political support of parochial school interests and the danger of running afoul of the First Amendment by making such schools eligible for vouchers. Although recent Supreme Court decisions on aid to parochial schools do not address this precise issue, they indicate that the present Court may not be receptive to a voucher plan which includes parochial schools.[16]

Footnotes

[1] *Education Vouchers: A Report on Financing Elementary Education by Grants to Parents* (Cambridge, Mass., Center for the Study of Public Policy, Dec., 1970), p. vii. Hereinafter referred to as *Education Vouchers.*

[2] See *Capitalism and Freedom* (Chicago: Chicago University Press, 1962), Chapter 6, for Friedman's basic voucher plan. This Chapter was republished with some lengthy notes by Friedman as "The Role of Government in Education" in *Perspectives on the Economics of Education:* ed. by Charles S. Benson (Boston: Houghton-Mifflin Co., 1963), p. 132. A more recent defense of the Friedman plan is "The Voucher Idea," *New York Times Magazine,* September 23, 1973, p. 22.

[3] "The Role of Government in Education," *supra,* n. 2, p. 135.

[4] This is necessary to prevent abuses resulting from schools setting tuition beneath the voucher level and using the cash rebate as an inducement for parents to enroll their children.

[5] Stephen Arons, "Equity, Option, and Vouchers," *Teachers College Record,* Vol. 72, No. 3 (Feb. 1971), p. 341. Also see *Education Vouchers, supra,* n. 1, pp. 29-30.

[6] Friedman vigorously attempts to rebut this criticism in "The Voucher Idea," *supra,* n. 2, pp. 66-67.

[7] Friedman looks with favor upon the development, under his voucher plan, of "highly capitalized chain schools, like supermarkets." *Ibid,* p. 23

[8] Theodore Sizer and Phillip Whitten, "A Proposed Poor Children's Bill of Rights," *Psychology Today,* August 1968; and Sizer, "The Case for a Free Market," *Saturday Review,* January 11, 1969.

[9] Irene Solet, "Education Vouchers: An Inquiry and Analysis," *Journal of Law and Education,* Vol. 1, No. 2 (April, 1972), p. 319.

[10] *Education Vouchers, supra,* n. 1.

[11] "Recreating the Family's Role in Education," 3-4 *Inequality in Education* 1. Also see Coons, Clune and Sugarman, *Private Wealth and Public Education* (Cambridge: Belknap Press, 1970), pp. 256-268; and Coons and Sugarman, "Family Choice in Education: A Model State System for Vouchers," *Calif. L. Rev.,* Vol. 59 (1971), p. 321.

[12] Several points of clarification may be necessary. First, the payment for education made under this plan would be *in addition* to whatever system of general taxation (Coons prefers the income tax) is used to support the public schools. Second, effort is based on family income and does not consider the number of children in the family. That is, if the family income requires a $3400 payment for admission to the high spending school, that payment is the same if there are one, two or ten children in the family. Third, a family's educational payment is limited to twice the per pupil expenditure of the high spending schools. This limit is thought necessary to assure that very wealthy families don't automatically flee the voucher schools for a purely private school.

[13] See *Education Vouchers, supra,* n. 1, p. 40; and Arons, *supra,* n. 5, p. 345.

[14] Friedman argues: "Let schools specialize ... and the pull of common interest will overcome the pull of color, leading, I believe, to far more rapid integration than is now in process ...." "The Voucher Idea," *supra,* n. 2, p. 65.

[15] Federal Courts have struck down several efforts by Southern legislatures to circumvent the Fourteenth Amendment by creating voucher systems. See *Coffey* v. *State Education Finance Committee,* 296 F. Supp. 1389 (S.D.Miss. 1969); *Griffin v. State Board of Education,* 296 F. Supp. 1178 (E.D. Va. 1969); *Poindexter v. Louisiana Financial Assistance Commission,* 296 F. Supp. 686 (E.D. La. 1968), *aff'd per curium sub non., Louisiana Education Commission for Needy Children* v. *Poindexter,* 393 U.S. 17 (1968).

[16] On June 25, 1973, the Supreme Court struck down a New York program to reimburse nonpublic schools on a uniform per pupil basis for costs incurred in state-mandated testing and record-keeping, *Levitt* v. *Committee for Public Education and Religious Liberty,* 93 S.Ct. 2814, another New York program providing direct grants to nonpublic schools for repairs and maintenance, partial tuition reimbursements for low income families whose children attend nonpublic schools and tax deductions for families failing to qualify for tuition reimbursements with children in nonpublic schools, *Committee for Public Education and Religious Liberty* v. *Nyquist,* 93 S.Ct. 2955, and a Pennsylvania tuition grant program for parents with children in nonpublic schools, *Sloan* v. *Lemon,* 92 S.Ct. 2982.

Alum Rock: Vouchers Pay Off

by Joel Levin

The voucher program is an attempt to create a market system of education. The consumers of education (children and their parents) are given equal purchasing power in the form of a voucher which is worth the annual per-pupil cost of education in their district. The first demonstration of this concept has just finished its first year in the Alum Rock Union School District on the East Side of San Jose, California.[1]

The district superintendent and a group of district principals already interested in decentralization were instrumental in initiating the Alum Rock voucher program. The first step in instituting the project was a feasibility study funded by the U.S. Office of Economic Opportunity. (Since then voucher funding has been transferred to the U.S. National Institute of Education.) Because of the interest and enthusiasm of these Alum Rock administrators, along with the support of local teachers and parents, the School Board voted to commit a portion of the district to implementation of a limited voucher program.

Project Particulars

In the particular voucher system operating in Alum Rock (derived from the Regulated Compensatory Education Voucher System Model) schools where vouchers can be spent are limited by state law to public schools. Private "free" or "alternative" schools can participate only if they have a contract which places them under the "exclusive" control of the local school board; parochial schools are excluded from participation because of the California State Constitution. To expand the options open to students in the district, therefore, each of the six public schools participating in the first year (there are 24 schools in the district) was required to offer and house two or more alternative programs, or *mini-schools*.

In Alum Rock's program, disadvantaged students are given a supplemental, or compensatory voucher to provide additional resources to the schools which serve them, and also to increase the incentive for these schools to develop programs which will attract them. This voucher plan, unlike others, does not permit parents to supplement the voucher value with private funds.

Besides the OEO feasibility study monies, the district also received OEO funds for program planning, human relations training, etc. Excluding federal and special income, the basic tuition voucher in Alum Rock's 1972-73 school year was worth approximately $800 for elementary school students and $1050 for middle school students. About $260 of each voucher went for central administrative and operational costs (central administrative salaries, transportation costs, fringe benefits, etc.). The remaining voucher funds were spent in the particular schools and programs. The 1973-74 voucher value has increased to $875 for elementary schools and to $1100 for middle schools; the central administrative and operational portion increased to $289 per voucher. Compensatory vouchers currently provide about $275 in supplemental funds per pupil recipient.

Reeducation

The concept of the voucher system — that

Joel Levin is Chairman of the Board of the Sequoia Institute and Director of the Voucher Project for the Alum Rock Union School District.

of supply and demand, the ability to regulate and influence through purchasing power — necessitated a complete rethinking of traditional public school practices. Reeducation occurred on many levels. Administrators had to implement a system which would deal with the individual preferences of the 3800-4000 elementary and junior high school students participating in the program's first year. Teachers worked in teams preparing suggestions and outlines for the dozens of possible program emphases or teaching methods which parents narrowed down, and from which they ultimately chose. Parents had to be carefully informed about the workings of the system, the specific educational options offered, as well as adapt to the parent involvement programs built into the system.

The Center for the Study of Public Policy[2] (originators and promoters of the Regulated Compensatory Education Model) provided technical assistance to the district prior to its decision to implement the program by conducting workshops and meetings for administrators, teachers and parents. After Alum Rock decided to launch its program, a core of community people (mostly parents of district school children) worked with district administrators and staff members from the Center and from OEO to understand all facets of the new program. This core group was then equipped to disseminate information, answer questions, and essentially familiarize parents with the new part they would play in directing their children's education.

While all of the numerous programs where a parent can spend his or her voucher teach the basic academic skills, a wide range of educational approaches is provided. They include and are specifically labelled: Traditional/Academic, Innovative/Open Classroom, Gifted, Fine and Creative Arts, Learning by Doing, Individualized Learning, Multi-Cultural and Bilingual/Bicultural. In most cases, these available choices are further broken down (e.g., the Innovative/Open Classroom category offers specialization programs with descriptive names like "Total Experiences," "Continuous Progress — Non-Graded," "School 2000", and "Down to Earth"). A basic explanation of each program and specialized approach is provided to parents and students, and includes information about the program, its governance, how student performance is evaluated, pupil-teacher ratio, class size, and communication with and involvement of parents.

Parent Choices

Obviously, such a system gives parents an enormous amount of potential power. This school year parents whose applications were received before May 25th were guaranteed a place in their first choice mini-school, even if this required creating an extension or "satellite" program in unutilized space of another building. Various forms of parent involvement are offered with each program, ranging from a minimal number of formal conferences in some to an active, decision-sharing parent advisory board in others. This year the overall Education Advisory Committee is composed of one elected parent and one elected teacher from each school. This Education Voucher Advisory Committee advises the Board of Trustees with regard to voucher issues.

In Alum Rock parents can exercise their power in the following ways:

1. Choosing the program which they think will best meet the needs of their child;
2. Allocating their child's educational dollars to that program;
3. Participating in the governance of their chosen program through its parent advisory committee, faculty screening committee, etc.;
4. Changing the program through dialogue, persuasion, or political pressure; for example, a group of parents can threaten to transfer if certain changes are not made;
5. Transferring their child — and a pro-rated share of his or her dollars — to another mini-school if no satisfaction can be achieved.

A parent who is dissatisfied faces relatively few bureaucratic obstacles. A transfer request form is filled out and the child is transferred.

A parent counseling unit (composed of parents from the district), under the supervision of several professional counselors, makes sure that all parents understand the rules and

know about all the programs. In addition, a centralized evaluation office publishes a report evaluating each mini-school in order to help parents exercise their choice wisely. Finally, if parents are dissatisfied with all the programs being offered, they can get together with some teachers and create a new program. If they attract enough children, their voucher income is guaranteed.

Effecting Results

How effectively parent power is used will be carefully evaluated during the projected five to seven years of demonstration. In general the voucher schools seem to have become very eager to please parents and listen to them. School responsiveness is built into the economics of the voucher program and is, of course, at the heart of the concept of the system. For example, each mini-school has to limit its expenses to the total voucher income which it receives from students who choose to attend. If a mini-school does not attract students, it does not receive any income and has to "fold." Some schools and mini-schools suffer reduced enrollments; consequently, teachers have to switch into programs that attract more children. In September, the first satellite programs were established in response to parent demand.

It is difficult to measure how wisely parents use their power to facilitate the best possible education of their children. How willing are parents to send individual children to different schools and mini-schools? How much are their decisions affected by possible desires to have children in the school nearest to their homes? The indications are that parents are increasingly selecting programs on the basis of what they deem best suited to their individual child's needs. In the first year, 38 percent of children from the same families were enrolled in different programs. The percentage of pupils who are leaving their neighborhood schools to take advantage of new second year programs has increased from 3 percent to 14 percent. (Free transportation is provided for children who attend schools beyond walking distance from their homes.)

Obviously, there are many difficulties in implementing a voucher system. Although OEO has funded a number of feasibility studies for the Regulated Compensatory Education Model of vouchers over the past several years (and the National Institute of Education continues to do so), Alum Rock has thus far been the only community to undertake a voucher plan which applies some of the Model in practice. Legislation for the true Regulated Compensatory Model, which includes options of both public and private schools, is difficult to pass. Furthermore, there has been strong opposition from teachers' organizations as well as civil rights groups who do not trust the system's safeguards against the creation of segregated schools or low-quality schools.

Despite the potential and actual problems and limitations, however, the Alum Rock Union School District community is demonstrating that its voucher plan can work. Feedback from the participants reveals not only general satisfaction, but often great enthusiasm for the project. This year seven more schools and approximately 5000 more pupils will join the project. Support and commitment are particularly evidenced by those parents who have not only exercised their option to choose, but also have become more involved in participating in and directing the education of their children.

Footnotes

[1] Alum Rock is a well integrated community (approximately 50 percent Chicano, 40 percent white and 10 percent black). It is also one of the poorest districts in California and about 50 percent of its pupils are eligible for compensatory monies.

[2] The Center for the Study of Public Policy, a nonprofit organization, has been funded since 1969 by several different OEO grants to study and promote the Regulated Compensatory Education Voucher System. It is currently funded by the U.S. National Institute of Education. Information, publications, bibliography, etc. can be obtained from the Center for the Study of Public Policy, 123 Mt. Auburn Street, Cambridge, Mass. 02138.

Vouchers for Public Schools

by John E. Coons and Stephen D. Sugarman

Education vouchers have been promoted as a means of increasing family autonomy for the non-wealthy by opening new choices in schooling. Until recently most proponents thought of these new options as exclusively in the private sector. Now the Alum Rock experiment and other developments suggest the possibility of increasing choice within the public systems. Perhaps the word "voucher" itself had previously obscured this possibility. Payment with a coupon was reminiscent of the private market. Further, some voucher schemes — notably Friedman's — were primarily designed with private schools in mind.

In any case, whatever additional psychological and informational benefits might be achieved by distribution of tickets, the sole administrative requirement is an accounting system which channels funds to the participating schools. The important question is not the medium of exchange, but the nature of the choices the public is willing to subsidize. And a certain variety is possible among public schools. Even today to a degree families may choose among public schools by the expedient (albeit an awkward one for the poor) of shifting residence to a new district or attendance area. A public school "voucher" system might be defined minimally as a mechanism to eliminate such a need for family migration, a way to sever the connection between the family residence and the school.

John E. Coons is Professor of Law at the University of California at Berkeley. Stephen D. Sugarman is Acting Professor of Law at the University of California at Berkeley. The authors are currently preparing a book on vouchers at Berkeley's Childhood and Government Project.

Today there are districts in which a degree of choice among schools is possible, although "vouchers" have never been mentioned. Instead, the districts speak of "open enrollment" plans. In many big cities, for example, students (and/or their parents) may choose among various public high schools. In parts of Minneapolis parents have an option among elementary schools. The "experimental schools" program in Berkeley, California offers a wide range of selections. Hence the observation that the Alum Rock "voucher" experiment is merely a form of "open enrollment" is fair, but hardly decisive. The question is the nature of the choices, both in substance and procedure.

Elsewhere we have considered the full range of policies competing for priority where private schools are included.[1] Most are relevant also to a public school choice system. The brevity of the following review of potential public school voucher policies and problems should not disguise their complexity.

Area of choice. Most discussion has assumed that voucher plans (public and/or private) would be instituted by and within individual school districts. Restricting the plan in this manner would eliminate the interesting possibility in a public school plan of permitting families to choose schools in other districts. Some Los Angeles families, for example, might prefer Beverly Hills High School to any choice in their own district. The possibility has obvious relevance to racial and economic integration in areas where whites have formed a noose around the central city. It is now doubtful that the courts will order metropolitan integration. If they do not, a principal hope for integration is the opening of suburban options to the city family. Some would choose them, and some

whites might lose interest in moving to the suburbs. On the other hand, whites in the city would be able to use suburban schools without changing residence.

Enrollment rules. The significance of the family's choice among public schools would be partly a function of whatever conditions were attached. For example, some schools might be reserved for applicants with certain credentials such as grades, test scores or recommendations. At the extreme the applicant would have to have the approval of the receiving school.

Consider the possible problems, however, if a plan attempted to maximize choice by allowing pupils to attend any school. What happens when schools are in unexpectedly high demand? While asking private schools to take all comers regardless of their numbers might be unfair and unwise, imposing such demands on public schools is certainly an option worth careful consideration. (1) It might produce substantial economic inefficiencies; (2) a school might have difficulty in making enough room (although portable classrooms or multiple sites are possible answers); and (3) the expectations of families who have selected a particular school may be frustrated by its change in size. These concerns argue in favor of selection by lot in cases of excess demand; that, in turn, means that families may not get their "choice" and procedures for second choice matching are needed.

Starting new schools and ending unpopular ones. Suppose some families are unhappy with all of the available public school choices; how will a public school voucher plan adjust? In order for the system to have the potential for diversity and consumer satisfaction that private schools do, the public system must be willing to introduce offerings which are responsive to family tastes. They should include, we suppose, such attractions as "mini-schools" or, in some climates, outdoor schools. Then there is the serious question of what to do with public schools which *lose* their appeal. Any choice system would seem to imply that schools survive on their ability to attract students, and if they could not, they would eventually close. Some observers are skeptical, perhaps with good reason, about the ability of government to admit the bankruptcy of one of its operations.

Personnel questions. In most states today public school teachers must be state-certified. Must all teachers in the public school voucher program be certified? If so (provided that certification requirements do not change), we suspect that many families will not be any more satisfied with the new offerings from the public sector than they were with the old ones. In addition, there is a serious problem about what to do with teachers who work at schools which lose popularity. Under a private school plan, they would run the same substantial job security risks as workers at firms whose employment rolls shrink or disappear. Would the now very strong teacher unions permit this in a public school plan? Would taxpayers be willing to underwrite, say, a full year's salary as severance pay for a teacher no longer needed? The Alum Rock school district is attempting to "retrain" such teachers and move them into more popular schools. This attempt, of course, creates the risk that a family will find its child assigned to the very teacher whom they have chosen to avoid.

Governance and independent public schools. It may be argued that many families are more interested in "voice" than in "choice". That is, they would be happier with substantial control over the school to which their children are presently assigned than with the choice of sending their children to other places. When private schools are involved in voucher plans, there is some merit to the view that families would use the economic bargaining power that the voucher represents to force schools to turn over power to them; at least some schools should cater to parents with such interests. The problem is more complicated when the plan is limited to public schools. One approach would be to designate each school's particular governing structure at the outset, and to use family responses as indicators of what alterations should be made. For example, some schools could be run by parent advisory councils, others by school principals, others by school faculties, and others by the students. How likely is this? In New York City a number of "private" schools (in the sense that we have conventionally understood "private" schools, that is, not publicly owned) have argued that they should be made part of (and hence funded by) the city public school system and be

designated "independent public schools". These schools already charge no tuition, accept all students for whom they have room on a first-come-first-served basis, and satisfy teacher certification and curriculum requirements. They have their own governing structure and would want to remain essentially free from the city's control. If state law permits, such schools could be included in a public school voucher plan. Not surprisingly, New York has not yet subsidized the "independent public schools".

Curriculum, values and style. To what extent could schools be expected to be very diverse under a public voucher system? In Alum Rock and Berkeley, there are very unusual names and descriptions of the programs available to the families. It is unclear, however, how truly varied these programs are. It is also unclear how parents with quite atypical values and views are able to find a school which suits them. Restrictions on style, curriculum and values would severely undercut a public school voucher plan's claim that family choice is substantially satisfied.

Two final points should be raised. First, voucher advocates have been struggling with the question of how the issue of "child's choice" fits the family orientation of most plans. A rather broad student choice, at least in high school, is perfectly conceivable in theory. Whether (and how) to make such choices operative is a problem which public school voucher plans should face. Second, if voucher plans (public and private) have been discussed as a choice among schools, why hasn't the choice of school program or the choice of teacher been considered as an option of equal potential? Significantly, for high school students at least, these choices are increasingly available, at least in theory. That is, a family may "choose" whether its children pursue college preparatory, vocational, or general education programs (and the list could be expanded substantially). Also, in some places at least, students are able to choose their teachers. If these options are not sufficient, what suggests that a public school voucher plan would be better? Experimentation might help us find out; but surely it would have to be experimentation with the widest possible spectrum of choices.

Footnote

[1] See, e.g., Coons and Sugarman, *Family Choice in Education* (Institute of Government Studies, Berkeley, 1971).

Photo by Betsy Cole

Notes and Commentary

This section of Inequality in Education *features reports on research, litigation, government action, and legislation concerning education and the law. Readers are invited to suggest or submit material for inclusion in this section.*

Students' Right to Write and Distribute

by Robert Pressman

This note discusses the case law dealing with students' rights to prepare and distribute non-school and school-sponsored written materials, "underground" and official newspapers and leaflets, for example. The section on unofficial materials begins with a discussion of *Tinker* v. *Des Moines Ind. Sch. Dist.*, 393 U.S. 503 (1969). While *Tinker* did not concern written materials, the courts have applied its standards in these cases. Subsequent sections cover the application of *Tinker's* principles; cases focusing on distributing students' violation of school rules rather than their expressive activity; rules of time, place and manner; and limitations on content with sections on, among other topics, requirements of prior review, obscenity and advocacy of rule violations and criticism.

The discussion on school-sponsored materials has two sections, the first dealing with censorship of publications and the second with access by unaffiliated students or persons. Some topics (*e.g.*, obscenity) are discussed in the sections on official and unofficial publications. Final sections discuss remedial principles and set forth some conclusions.[1]

NON-SCHOOL SPONSORED MATERIALS

1. The Tinker Case

In *Tinker*, the Supreme Court upheld the right of students to wear, *within school*, black armbands expressing opposition to the Vietnam War. At the outset, the Court considered the applicability of the First Amendment in the school environment.

> First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. (393 U.S. at 506.)

Three additional principles set forth in *Tinker* are pertinent here. First, the Court stated that free expression must prevail in the absence of appropriate specific evidence, and defined the necessary showing (393 U.S. at 511, 513):

> In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.
>
> ***
>
> But, conduct by the student, in class or out of it, which for any reason — whether it stems from time, place, or type of behavior — materially disrupts classwork or involves substantial disorder or invasion of the rights of others, is, of course, not immunized by the constitutional guarantee of freedom of speech.[2]

In short, *Tinker* rejected a *per se* approach to free expression in the school context. Activity is neither immunized because it might be elsewhere, nor unprotected because it occurs in

Robert Pressman is a Staff Attorney at the Center for Law and Education.

school. Instead there must be in each case an inquiry as to the impact of the activity on the school program and the rights of others.

In applying the standard in *Tinker*, the Court summarized the pertinent facts as follows (393 U.S. at 508):

> Only a few of the 18,000 students in the school system wore the black armbands. Only five students were suspended for wearing them. There is no indication that the work of the schools or any class was disrupted. Outside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises.

Further, it characterized the activity as "a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners." (393 U.S. at 508.)

Second, *Tinker* emphasized the breadth of the right to free expression in the school environment, absent the requisite showing (393 U.S. at 512 - 513):

> The principle of these cases is not confined to the supervised and ordained discussion which takes place in the classroom. The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student's rights, therefore do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam.

As a corollary, sham opportunities for speech are inadequate. "Under our constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact." (393 U.S. at 513.) Officials do not satisfy their constitutional obligations by providing a "safe haven for crackpots" or confining speech "to a telephone booth. . . ." (393 U.S. at 513.)

Third, the Court stressed that only concrete concerns will support the limiting of expression. What "may" happen or "might result" is immaterial. (393 U.S. at 508, 510.) "[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." (393 U.S. at 508.)

In subsequent cases, the Court has adhered to the *Tinker* standard. *Grayned* v. *Rockford*, 92 S.Ct. 2294 (1972), involved the application of an anti-noise ordinance to a demonstration adjacent to a school. The opinion explains *Tinker's* standard as follows (92 S.Ct. at 2304, emphasis added):

> Expressive activity could certainly be restricted, *but only* if the forbidden conduct 'materially disrupts classwork or involves substantial disorder or invasion of the rights of others.'

In *Papish v. Bd. of Curators*, 93 S.Ct. 1197 (1973), the Court directed reinstatement of a student who had distributed an underground newspaper. While the case focused on the paper's content, the Court noted that there had been no claim of disruption and referred to the *Tinker* standard. (93 S.Ct. at 1199-1200, n. 6.) See also *Healey* v. *James*, 92 S.Ct. 2338, 2350 (1972) (college's refusal to recognize organization).

2. Application of the *Tinker* Standard

The case law in outline

The cases generally employ *Tinker's* disruption standard in assessing the legality of both actual instances of distribution and regulations governing distribution. *E.g., Riseman v. Sch. Comm. of Quincy*, 439 F.2d 148, 149 (C.A. 1, 1971); *Eisner v. Stamford Bd. of Ed.*, 440 F.2d 803, 808 (C.A. 2, 1971); *Quarterman* v. *Byrd*, 453 F.2d 54, 58-59 (C.A. 4, 1971); *Shanley* v. *Northeast Ind. Sch. Dist.*, 462 F.2d 960, 969 (C.A. 5, 1972); *Scoville* v. *Bd. of Ed.*, 425 F.2d

10, 13 (C.A. 7, 1970).

In nine cases, *Tinker's* disruption standard has been applied to instances of distribution of materials by students. Distribution has been viewed as protected in seven cases[3] and unprotected twice.[4] In six cases, distribution rules have been held facially defective, at least in part because of inconsistency with *Tinker's* disruption standard. *Riseman, supra,* 439 F.2d at 149; *Quarterman, supra,* 453 F.2d at 58-59; *Vail, supra,* 354 F.Supp. at 597-598; *Jacobs* v. *Bd. of Sch. Commissioners,* 349 F.Supp. 605, 611-612 (S.D. Ind., 1972); *Rowe* v. *Campbell Union High Sch. Dist.,* C.A. No. 51060 (N.D. Cal., Nov. 10, 1970) (Mem. Op. at 4-9); *O'Reilly v. San Francisco Unified Sch. Dist.,* C.A. No. 51427 (N.D. Cal., Mem. Op., Nov. 10, 1970).[5] In *Eisner, supra,* the Court construed a regulation to be consistent with *Tinker* standards. (440 F.2d at 808.)

Several points recur in applications of the disruption standard. Which party has the burden of justification where an attempt to limit student expression is challenged? What is the nature of that burden and how may it be met? May distribution be halted or a student punished because of the way others react?

Meeting the burden of justification

Tinker seemed to place the burden of justifying a limitation of expression on the system.[6] Three courts of appeal have been more explicit. *Scoville, supra,* 425 F.2d. at 13; *Eisner, supra,* 440 F.2d at 810; *Shanley, supra,* 462 F.2d at 969 and n. 7. *Tinker* required "a specific showing of constitutionally valid reasons to regulate... speech...." (393 U.S. at 511.) Subsequently, courts have described this showing in a variety of ways. See *Eisner, supra,* 440 F.2d at 810 (". . .a reasonable basis. . .courts will not rest content with officials' bare allegations. . . ."); *Quarterman, supra,* 453 F.2d at 59 (". . .substantial facts which reasonably support a forecast of likely disruption. . . ."); *Shanley, supra,* 462 F.2d at 974 (". . .demonstrable factors. . . ." ". . .expression cannot be stifled on the sole ground of intuition. . . ." "[limitation must be] substantiated by some objective evidence to support a 'forecast' of disruption....").

Several cases apply *Tinker's* "undifferentiated fear" admonition in rejecting school system contentions. *Fujishima* v. *Bd. of Ed., supra,* 460 F.2d at 1359 (speculation that students "might" use a fire drill or instigate one to disrupt); *Jones* v. *Bd. of Regents, supra,* 436 F.2d at 621 (disputes "might" arise); *Vail supra,* 354 F.Supp. at 599 (what "could" or "might" happen); *Channing Club* v. *Bd. of Regents, supra,* 317 F.Supp. at 691 (". . .administrative officials anticipated the possibility of some disturbance. . . .").

The decisions in *Scoville, Shanley, Rowe* and *Sullivan, supra,* illustrate four different issues. In *Scoville* students were expelled after they sold 60 copies of their paper to faculty and students. An editorial criticized an orientation pamphlet distributed to parents. It "urge[d] all students in the future to either refuse to accept or destroy upon acceptance all propaganda that Central's administration publishes." It termed one article "Quite ridiculous" and referred to the procedure for excusing absences as "utterly idiotic and asinine. . . ." The students viewed a statement by the senior dean as "the product of a sick mind." (425 F.2d at 15-16.) The district court sustained the school system, reasoning that the article "amounted to an immediate advocacy of, and incitement to, disregard of school administrative procedures. . . ." (425 F.2d at 25.) The court of appeals reversed. It noted the lower court's finding that no disruption had followed distribution and the failure to take evidence on the impact of the literature on those who bought it. (425 F.2d at 12, 14.) It found "criticism of . . .disciplinary policies" and "the disrespectful and tasteless attitude [exhibited] toward [the dean]" insufficient to support a reasonable forecast of disruption. (425 F.2d at 14.)

In *Shanley, supra,* the court considered a contention that the controversial nature of materials supported a reasonable forecast of disruption. Articles advocated a review of marijuana laws and offered information on birth control. The court rejected the claim, reasoning that " 'controversy' is. . .never sufficient in and of itself to stifle the views of any citizen. . . ." (462 F.2d at 971.)[7] The court added that a presidential commission had recently made a similar recommendation on marijuana, that many library materials dealt with birth control and the subjects were widely discussed. (462 F.2d at 972.) The reference to library

materials on birth control introduces a point of some significance. Officials should not be able to establish disruption or another basis for limiting speech when all that is shown is conduct by students which is fully consistent with other practices in the system.[8]

The *Rowe* case, *supra*, emphasized that restrictions must be closely related to asserted policy justifications. "[T]he mere invocation of 'immaturity' does not serve to validate general restrictions on students' rights." (Mem. Op. at 7.) The court also referred to the need for achieving objectives by "narrower, more particular regulation." For example, if littering is a problem, rather than prohibiting all distribution, "[l]ittering can be prohibited and punished. . . ." [Mem. Op. at 9, citing *Schneider v. New Jersey*, 308 U.S. 147, 162 (1939).]

In *Sullivan, supra*, the court held that distribution of an underground paper had not "materially and substantially interfere[d]" with the school program. The court viewed interruptions of class periods as "minor and relatively few in number." It stressed that in the pertinent period only one "discipline card" in any way related to the paper was filed. (307 F.Supp. at 1341.) Three teachers had found it necessary to confiscate copies during classes and a fourth before class. In two math classes, there were requests to discuss the paper. Copies were found in a boys' restroom and inside sewing machines in a homemaking class. The papers had been distributed off campus and distributors had requested that they not be taken into school. (307 F.Supp. at 1333-1334.)

Some guidance on the proper application of the disruption-disorder standard may be gleaned from *Burnside v. Byers*, 363 F.2d 744, and *Blackwell v. Issaquena County Bd.*, 363 F.2d 749, decisions on "freedom buttons" by a single Fifth Circuit panel in 1966. *Tinker's* standard was drawn from these cases. See 393 U.S. at 513. In *Burnside*, students wore buttons on voting rights in their high school after being forbidden to do so by the principal. "The record indicate[d] only. . .mild curiosity on the part of the other school children over the presence of some 30 or 40 children wearing such insignia." The court held the regulation "arbitrary and unreasonable. . . ." (363 F.2d at 748.) In *Blackwell* a regulation against the wearing of similar buttons was upheld. The court found "an unusual degree of commotion, boisterous conduct, a collision with the rights of others, an undermining of authority, and a lack of order, discipline and decorum." (363 F.2d at 754.) In this case, some students had: talked noisily in the hall during scheduled class periods; pinned buttons on unwilling students; when sent home, invited others to join; and at an assembly, "conducted themselves discourteously and displayed an attitude of hostility." (363 F.2d at 751.) See also *Karp v. Becken*, 477 F.2d 171 (C.A. 9, 1973).[9]

The reaction of others

Tinker does not explicitly address the question of whether orderly and otherwise proper expressive activity may be ended or punished if others react disruptively, although its factual summaries do allude to the conduct of other students. See 393 U.S. at 508, 514. Several cases consider this point.

Orders entered in *Sullivan v. Houston Ind. Sch. Dist.*, 333 F.Supp. 1149, 1153 (S.D. Tex., 1971), supplementary injunctions vacated on other grounds, 475 F.2d 1071 (C.A. 5, 1973), and *Jacobs* v. *Bd. of Sch. Commissioners, supra*, 349 F.Supp. at 611, state that "rules must not subject any covered student to the threat of discipline because of the reaction or response of any other person to the written material. . . ."[10] In *Shanley, supra*, the Fifth Circuit addressed this issue (462 F.2d at 974):

> We are simply taking note here of the fact that disturbances can be wholly without reasonable or rational basis, and that those students who would reasonably exercise their freedom of expression should not be restrained or punishable at the threshold of their attempts at expression merely because a small, perhaps vocal or violent, group of students with differing views might or does create a disturbance.

There is support for requiring reasonable efforts to protect the orderly distributor from the hostile audience. In *Jones* v. *Bd. of Regents, supra*, plaintiff distributed leaflets on a university campus in violation of a rule; he also wore a sign. "[T]wo members of the crowd were moved to tear the sandwich boards from Jones' body. . . ." The court stated that rather than

remove Jones, "police had the obligation of affording him the same protection they would have surely provided an innocent individual threatened, for example, by a hoodlum on the street." (436 F.2d at 621.)[11] There may be instances where reasonable efforts directed at disorderly persons fail. In such cases it may be necessary to stop, but not punish, the distributor.[12]

The Norton and Baker cases

The foregoing discussion provides a basis for considering the two cases which ruled against students on the disruption issue, *Norton* v. *Disc. Comm. of East Tenn. State Univ.* and *Baker v. Downey City Bd. of Ed., supra.* In *Norton,* students were suspended for distributing literature on the campus. The literature referred to administrators in demeaning terms, and a section criticizing student apathy contained a series of questions which read, in part (419 F.2d at 197):

> Have they seized buildings and raised havoc until they got what they were entitled to like other American students? — No.

The court of appeals in upholding the suspensions found that the quoted language supported the district court's finding that the students had "encourag[ed] demonstrations similar to those which had occurred on other campuses throughout the country [at Columbia University and elsewhere]. . . ." (419 F.2d at 197; explanation added.)

The *Norton* court also held that administrators had reasonably forecast disruption. This ruling was based upon (1) testimony of administrators that "both handouts *could conceiveably* cause an eruption" and that there were "very definite fears that we *might* have serious consequences," and (2) that after distribution of the first piece of literature twenty-five students told a dean they "wanted to get rid of this group of agitators." (419 F.2d at 197, 199.) *Tinker* and the subsequent cases establish that what "could conceiveably" or "might" happen is an inadequate basis for limiting expression.[13] As pointed out by the dissenting judge, alternatives not involving sanctions to the distributors were available to the dean visited by the twenty-five students. (419 F.2d at 207.)

In *Baker v. Downey City Bd. of Ed., supra,* the court upheld suspensions for "profanity or vulgarity." It also found that distribution of 450 copies of an underground paper had been disruptive. The court relied on the following testimony (307 F.Supp. 522):

> . . .A few teachers testified that there were disruptions in their classes and some testified to the contrary. On cross-examination, Mr. Shiney stated that some 25 to 30 teachers had told him of their classes being interrupted and of failure in attention on the part of students due to their reading of and talking about Oink during class. Mr. Robinson concurred.

A "failure of attention" in the classroom — by students engaging in private conversation or reading non-germane materials — is a common problem. The court addressed this issue in the *Rowe* case, *supra* (Mem. Op. at 8-9, footnote omitted):

> The fact that students may *think* about the newspapers during class is not a 'disruption' justifying restriction. The dissent made this same point in *Tinker*, but it was not accepted. The teachers unquestionably have the right to control class *discussion* and to discipline those who persist in talking about other things or refuse to respond to questions regarding the subject matter of the discussion. These are the narrower, more specific type of restrictions on student communication that are proper and do relate to actual disruption of classwork or discipline.

See also *Sullivan, supra,* 307 F. Supp. at 1341.

3. The Schwartz Case and its Progeny

Three cases uphold the disciplining of student distributors by focusing on a disregard of school regulations and/or defiance to officials. See *Schwartz* v. *Shuker,* 298 F.Supp. 238 (E.D.N.Y., 1969); *Graham* v. *Houston Ind. Sch. Dist.,* 335 F.Supp. 1164 (S.D. Tex., 1970); *Sullivan* v. *Houston Ind. Sch. Dist.,* 475 F.2d

1071 (C.A. 5, 1973).

In *Schwartz* a student was suspended for "insubordination and insolent behavior." He had appeared on campus with copies of an underground paper after the principal had reviewed a previous issue and informed him that it must not be distributed on school grounds. "This issue, among other things, criticized Principal Schuker, referring to him as 'King Louis,' a 'big liar,' and a person having 'racist views and attitudes.' " (298 F.Supp. at 240.) The court described the full range of the plaintiff's conduct as follows (298 F.Supp. at 241):

> When cautioned not to bring on school premises copies of the newspaper, he nevertheless did so; when asked to surrender the same, he refused and in addition attempted to influence another student to do likewise; when suspended from school and told not to report, he nevertheless appeared in school and admitted defiance of the superintendent's orders.

The court upheld the suspension as based on "flagrant and defiant disobedience of the school authorities" rather than "protected activity under the First Amendment. . . ." (298 F.Supp. at 241-242.)

The *Graham* court expressly followed *Schwartz* holding that "plaintiffs were reprimanded more for disobedience than for the dissemination of material protected under the first amendment." (335 F.Supp. at 1166.) Students had distributed an underground newspaper on campus after two announcements that unauthorized distribution would result in disciplinary measures. The Court found an absence of *Tinker*-style disruption. (335 F.Supp. at 1167.) The court characterized as "intransigent" the students' persisting view that they were entitled to distribute and referred to testimony of one student that "a major purpose" had been to "flaunt" the rule. (335 F.Supp. at 1165.)

Sullivan which vacated a district court ruling for a student also expressly followed *Schwartz*. The Court viewed punishment as based upon a "flagrant disregard of established school regulations, . . . open and repeated defiance of the principal's request, and. . . resort to profane epithet. . . ." (475 F.2d at 1076.) Here the student had: (1) distributed an underground paper without permission in violation of a widely publicized, written school rule; (2) returned to the campus during a suspension; and (3) twice shouted profanity at his principal within the hearing of others.

Schwartz and *Graham* raise two important questions: first, should a court uphold a suspension based upon charges covering conduct which is partially protected free speech activity and partially unprotected action? Second, may a student be punished by characterizing as disobedience his breach of an unconstitutional rule? These cases raise each question because of the absence of holdings that all of the conduct on which discipline was based was unprotected (298 F.Supp. at 241; 335 F.Supp. at 1166), and the describing of the existing distribution rule in terms not fully consistent with the rule later adopted in the respective circuit.[14] If this reading is correct, the cases depart from traditional free expression principles.[15]

Graham in particular raises questions about basing sanctions on the choice of words used to characterize conduct. "Conscientious" could have replaced "intransigent," and "test" could have been used for "flaunt." *Tinker* involved an almost precisely parallel "flaunting" of rules. (393 U.S. at 735.)[16]

Sullivan may be read in a manner consistent with these concerns. First, since the prior review requirement which the student breached was roughly consistent with the one approved by the Fifth Circuit in *Shanley, supra*, there was apparently no protected free speech activity involved.[17] Second, the court *viewed* the prior review rule as constitutional, stating, in part (475 F.2d at 1076):

> And it cannot be seriously urged that this prior submission rule is unconstitutionally vague or overbroad. . . .
>
> * * *
>
> [W]e do not invite school boards to promulgate patently unconstitutional regulations governing student distribution of off-campus literature.[18]

Also, *Sullivan* cited *Healey v. James*, 92 S.Ct. 2338 (1972) (college's refusal to recognize a

student group), as "approv[ing] the principle that the open disregard of school regulations is a sufficient and independent ground for imposing discipline. . . . " (475 F.2d at 1076.) *Healey* refers to "reasonable" and "valid" rules. (92 S.Ct. at 2352.)

4. Rules of Time, Place and Manner

Following traditional free expression principles, the cases state that distribution may be regulated by reasonable rules of time, place and manner. *E.g., Riseman v. Sch. Comm. of Quincy, supra,* 439 F.2d at 149, n. 2; *Shanley* v. *Northeast Ind. Sch. Dist., supra,* 462 F.2d at 969; *Fujishima* v. *Bd. of Ed., supra,* 460 F.2d at 1359. In two cases, courts have rejected attempts to uphold broad prohibitions as mere time, place and manner regulations. *Jones* v. *Bd. of Regents, supra,* 436 F.2d at 620-622; *Rowe* v. *Campbell Union High Sch. Dist., supra,* Mem. Op. at 5-6. In *Papish,* the Supreme Court found that dismissal had in fact been based on the content of a publication rather than as urged the place of its distribution. (93 S.Ct. at 1199 and n. 6.)

Dicta frequently counsel against excessive vigor in the manner of distribution. "Were one student to attempt to force material on another, he could be disciplined. There is no evidence whatsoever this has occurred." *Rowe, supra,* Mem. Op. at 7. See also *Shanley, supra,* 462 F.2d at 970, 971 at n. 8; *Jacobs* v. *Bd. of Sch. Commissioners, supra,* 349 F.Supp. at 611 (". . .not coercive of any other person's right to accept or reject any written material. . . ."); *Tinker, supra,* 393 U.S. at 504, n. 1.

In *Jacobs, supra,* the court invalidated a rule forbidding sales. (349 F.Supp. at 610.) This accords with generally applicable free speech principles. *New York Times* v. *Sullivan,* 376 U.S. 254, 266 (1964).[19]

Few cases have focused on where on the school campus students may distribute materials.[20] In *Riseman, supra,* the First Circuit reversed a lower court order limiting distribution to "school premises *outside* of school buildings. . . ." (439 F.2d at 149.) The appellate court approved "orderly and not substantially disruptive distribution" by students not engaged in regular school duties "on the school grounds. . . including within the buildings. . . ." The court also authorized issuance of reasonable rules of time, place and manner. (439 F.2d at 149, n. 2.)[21] The orders entered in *Sullivan* and *Jacobs, supra,* are consistent with *Riseman.* They require a showing of disruption of the school program to support limitations on distribution before and after school and at other times when students are not engaged in regular school duties. (333 F.Supp. at 1152; 349 F.Supp. at 611.) See also *Matter of Schiener,* 11 N.Y. Ed. Rept. 293, 294 (N.Y. Comm'er of Ed., 1972) (limiting distribution of underground paper to school exits at dismissal is unreasonable). *Rowe v. Campbell Union High Sch. Dist., supra,* Mem. Op. at 6. ("[T]he argument that the existence of an alternative forum or mode of expression permits suppression of the chosen one has consistently been rejected.")[22]

The most significant question on time and place regulations has not been answered expressly; namely, does the time and place rubric authorize vastly more severe limitation on expression than those imposed by application of *Tinker's* disruption standard. This shouldn't be the case, since the *Tinker* standard is designed to protect school system interests. This position finds support in *Grayned v. Rockford, supra,* where the Supreme Court considered the applicability of an anti-noise ordinance to a demonstration adjacent to a school. After noting that free speech activity could be subjected to reasonable time, place and manner rules, the Court analyzed the ordinance in terms of the *Tinker* disruption standard suggesting that it is a particularization of the time, place and manner rule. (92 S.Ct. at 2302-2305.)

Attempts to impose time and place limitations should be closely tied to particular problems in a school. For example, if stairways are crowded between periods, distribution could be forbidden there. Of course, such distribution could be considered disruptive of the school program, *i.e.,* interfering with students' reaching class on time. This again demonstrates the close relationship of the standards. See also *Sullivan, supra.*[23]

Fujishima, supra, deals with several questions of time, place and manner. There, the court invalidated a suspension for distribution during a fire drill because the system's rule was unconstitutional and there was no proof of dis-

ruption of the drill. The court stated that the board might prohibit such distribution as a regulation of time and place. (460 F.2d at 1355.) There is a reasonable basis for seeking order during a drill to protect safety and expedite the return of students to classes. Such a limitation will have a limited impact on expression given the infrequency of fire drills. The *Fujishima* court also stated that a system may not require students to seek in advance of each distribution approval of the time, place and manner. "The board has the burden of telling students when, how and where they may distribute material." (460 F.2d at 1359.)

5. The Content of Materials

Again mirroring traditional principles, the cases indicate that materials will sometimes be unprotected because of their content.[22] This section considers the permissibility of a scheme of prior review of content, obscenity, libel, criticism of officials and advocacy of violation of rules, and anonymity.

Prior review

The cases are divided on the *per se* validity of a requirement of prior review of content. Three courts of appeal have upheld a scheme of prior review in principle. See *Eisner* v. *Stamford Bd. of Ed., supra,* 440 F.2d at 805-808; *Quarterman* v. *Byrd, supra,* 453 F.2d at 57-59; *Baughman* v. *Freienmuth,* 478 F.2d 1345, 1348 (C.A. 4, 1973); *Shanley* v. *Northeast Ind. Sch. Dist., supra,* 462 F.2d at 969.[25] District court orders and dictum in an opinion of a three judge court in another circuit are to the same effect. *De Anza High School Students, supra; Mt. Eden High School Students, supra; Rowe* v. *Campbell Union High Sch. Dist., supra,* Mem. Op. at 11-12 (dictum).

In each of the cases, however, the challenged regulation was held constitutionally defective. Each court applied *Freedman v. Maryland,* 380 U.S. 51 (1965) and held procedures inadequate because of the absence of an expeditious review mechanism and/or a statement on when and how material must be submitted. *Eisner, supra,* 440 F.2d at 810-811;[26] *Quarterman, supra,* 453 F.2d at 59-60; *Baughman, supra,* 478 F.2d at 1348; *Shanley, supra,* 462 F.2d at 977-978.[27] Other grounds invoked were: (1) vagueness because of the failure to define "distribution" (*Eisner, supra,* at 811; *Baughman, supra,* at 1349; *Shanley, supra,* at 977); (2) absence of standards for evaluating materials (*Quarterman, supra,* at 59; *Baughman, supra,* at 1349; *Shanley, supra,* at 977); (3) absence of a provision applicable in a situation where a principal fails to act (*Baughman, supra,* at 1348); (4) overbreadth in applying to distribution unrelated in time or place to orderly conduct of school activities (*Shanley, supra,* at 976); and (5) "terms of art such as 'libelous' and 'obscene' are not sufficiently precise and understandable by high school students and administrators untutored in the law to be acceptable criteria." *Baughman, supra,* at 1350.

The Court of Appeals for the Seventh Circuit in *Fujishima v. Board of Ed., supra,* 460 F.2d at 1357, invalidated a prior approval rule of the Chicago school system "as a prior restraint in violation of the First Amendment." See also *Jacobs, supra,* 349 F.Supp. 609-610 (following *Fujishima*). In *Riseman* v. *Sch. Comm. of Quincy, supra,* the First Circuit set forth a general rule governing distribution. It provides in part (439 F.2d at 149, n. 2):

> [N]o advance approval shall be required of the content of any such paper. However, the principal may require that no paper be distributed unless, at the time that the distribution commences, a copy thereof, with notice of where it is being and/or is to be distributed, be furnished him, in hand, if possible.

The decisions allowing prior review rely upon two factors. *Shanley* refers to "the necessity for discipline and orderly processes in the high school. . . ." (462 F.2d at 969.) *Eisner* and *Quarterman*[28] cite *Tinker's* reasonable forecast language (393 U.S. at cite 514.)[29] The Supreme Court has not resolved the conflict among the circuits on prior review in the school setting. However, its general view on prior restraint and several other factors provide a basis for analyzing the disagreement.

First, the Court's decisions make it clear that prior restraint is disfavored.

> Any prior restraint on expression comes to this Court with a 'heavy presumption' against its con-

> stitutional validity. Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175, 181. . . (1968); Bantam Books, Inc. v. Sullivan, 373 U.S. 58, 70. . .(1963). Respondent thus carries a heavy burden of showing justification for the imposition of such a restraint.
>
> *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

In *New York Times Co.* v. *United States*, 403 U.S. 713 (1971), the Pentagon Papers case, the ground for decision on which the majority agreed was the government's failure to meet its burden of justifying prior restraint. (403 U.S. at 714.) In *Healey* v. *James*, 92 S.Ct. 2338, 2348 (1972), the Court stated that the traditional "heavy burden" standard applies to prior restraint on the college campus.

Second, the reasonable forecast language in *Tinker* provides questionable support for imposing prior review. The Seventh Circuit stated in *Fujishima* in criticizing *Eisner* (460 F.2d at 1358):

> In proper context, Mr. Justice Fortas' use of the word 'forecast' in *Tinker* means a prediction by school officials that existing conduct, such as the wearing of arm bands — if allowed to continue — will probably interfere with school discipline.

This accurately describes the use made of the standard in *Tinker*. See 393 U.S. at 514. In addition, the reasonable forecast standard has another meaning not involving prior review; namely, as a test for use in developing a regulation governing distribution, but not including any prior review. Finally, *Eisner* and *Quarterman* in effect use language in a case where prior review was not an issue and not discussed to support a review system, despite a number of other cases explicitly establishing Supreme Court antipathy to prior restraint.

Third, none of the cases relate the need for prior review to abuses by students in the particular system, although *Quarterman*, which dealt with the facial validity of a regulation, refers to a publication as "inflammatory and potentially disruptive ...." (453 F.2d at 54.) In *Shanley*, where the court relied principally on the need for discipline and order, the court noted that students had distributed materials only before and after school near but outside school grounds, that there was "absolutely no disruption of class" and that the underground paper was "probably one of the most vanilla-flavored ever to reach a federal court. " (464 F.2d at 964.) The Supreme Court's language in *Healey, supra*, suggests that prior review should not be imposed solely on the basis of a general concern for discipline as in *Shanley*. The Court referred to the college's interest in "preventing disruption," noted that this "may" justify prior restraint and stated that the college must satisfy a "heavy burden." (92 S.Ct. at 2348.) In short, the general interest in avoiding disruption was inadequate. Absence of prior review of content will not render officials powerless. Rules could define impermissible content and contain sanctions.

Fourth, a system of prior review of content creates a great risk of improper suppression. Generally, school officials — representing an entire community (and perhaps elected) — will have a narrower view of protected speech than students. Robust expression at the periphery of the zone of protection is not often favored. *Shanley* is again illustrative. There, the "controversial" statements advocated a review of marijuana laws and offered information on birth control. A Presidential Commission had made the same recommendation on marijuana laws and many materials in the school's library dealt with birth control. The court described the system's concern as "odd." (462 F.2d at 972.) Also, it characterized two of its legal points as "a constitutional fossil, exhumed" and involving remarkable reliance on the conditional verb "could." (462 F.2d at 967, 975.) How will this system do even with a perfect rule? More significantly, how many students will not take the initial risk of submitting material or be unable to overturn an adverse decision because of unawareness of their rights or lack of resources?

Obscenity

Obscene material is unprotected. See *e.g., Shanley v. Northeast Ind. Sch. Dist., supra*, at 971; *Jacobs v. Bd. of Sch. Commissioners, supra*, at 610, 611. The significant question is whether the technical definition of obscenity applies or material may be prohibited because it

is vulgar, profane or contains "four letter words."

The Supreme Court resolved the issue at the college level in *Papish v. Bd. of Curators, supra.* There, a student was expelled after distributing on campus, without ensuing disruption, an underground newspaper containing a political cartoon showing policemen raping the Statue of Liberty, and an article entitled "Mother Fucker Acquitted." The lower courts upheld the expulsion. The district court found the paper obscene; the court of appeals found it unnecessary to reach that question because "on a university campus 'freedom of expression' could properly be 'subordinated to other interests such as, for example, the conventions of decency. . . .' " (93 S.Ct. at 1199, quoting court of appeals, 464 F.2d at 145.) The Supreme Court reversed.

> We think Healey [v. James, 408 U.S. 169 (1972)] makes it clear that the mere dissemination of ideas — no matter how offensive to good taste — on a state university campus may not be shut off in the name alone of 'conventions of decency.' Other recent precedents of this Court make it equally clear that neither the political cartoon nor the headline story involved in this case can be labelled as constitutionally obscene or otherwise unprotected. *E.g.* Kois v. Wisconsin 408 U.S. 29 (1972); Gooding v. Wilson, 405 U.S. 518 (1972); Cohen v. California, 403 U.S. 15 (1971)....[30]
>
> (93 S.Ct. 1199; original footnote omitted)

Papish in effect undermines the authority of *Norton v. Disc. Comm. of East Tenn. State Univ., supra,* insofar as any reliance was placed in *Norton* on distribution of materials containing "crude, vulgar remark[s]" — plainly not legally obscene — in upholding suspensions. See 419 F.2d at 198.

Papish is not dispositive on the standard applicable in cases involving high school students for two reasons. In *Ginsberg v. New York,* 390 U.S. 629, 636 (1968), the Court accepted the notion of differential standards of obscenity depending upon age. Second, some cases have suggested a distinction between college and high school students. *E.g., Quarterman v. Byrd, supra,* 453 F.2d at 57-58 and n. 7. *Papish* does not discuss this question. It may be argued from *Ginsberg,* however, that something approaching the standard legal definition applies.

Generally, high school students have prevailed on obscenity issues. Courts have found materials not obscene employing the same standard used in *Papish* and/or have found insufficient basis for distinguishing student expression from materials part of the school program. The one exception to this pattern, *Baker v. Downey City Bd. of Ed., supra,* is discussed below.

In two cases, courts applying the technical definition of obscenity held that particular non-school-sponsored publications were not obscene. See *Vail v. Bd. of Ed., supra,* 354 F.Supp. at 599; *Sullivan v. Houston Ind. Sch. Dist., supra,* 333 F.Supp. at 1162-1167, supplementary injunctions vacated on other grounds, 475 F.2d 1071 (C.A. 5, 1973). Each of these cases involved, in part, the word "fuck." In *Fujishima, supra,* the Seventh Circuit stated that rules could forbid obscenity and added (460 F.2d at 1359, n. 7):

> Defendants here do not argue that *The Cosmic Frog* is obscene, but some school administrators have labeled as obscenity the sort of profanity and vulgarisms which appears in *The Cosmic Frog.* They are incorrect, because those words are not used to appeal to prurient sexual interests. See Sullivan v. Houston Independent School District, 333 F.Supp. 1149, 1162-1167 (S.D. Tex. 1971).

See also *Jacobs v. Bd. of Sch. Commissioners, supra,* 349 F.Supp. at 605, 610 (technical definition of obscenity applicable); *Scoville v. Bd. of Ed., supra,* 425 F.2d at 14 (appearance of sentence "Oral sex may prevent tooth decay" not a basis for sanction).[31]

Courts have been unwilling to uphold sanctions based on students' using words which also appeared in school materials. In *Vought v. Van Buren Pub. Sch.,* 306 F.Supp. 1388 (E.D. Mich., 1969), a student was ex-

pelled for possessing in school a "24-page tabloid-type" publication in violation of a school regulation forbidding possession of obscene literature. The student conceded that the magazine contained some "obscene" words, *e.g.*, "fuck." (The concession is questionable in view of the other cases.) The proof revealed that J.D. Salinger's *The Catcher in the Rye* and an issue of *Harper's Magazine* used in the school program contained the same word. The court held: "[T]he inconsistency is so inherently unfair as to be arbitrary and unreasonable, constituting denial of due process, thus compelling us to conclude that the plaintiff's expulsion may not stand." (306 F.Supp. at 1396.)

See also *Channing Club v. Bd. of Regents*, 317 F.Supp. 689 (N.D. Tex., 1970) (discrimination and denial of equal protection; university attempt to prohibit publication of off-campus paper); *Sullivan v. Houston Ind. Sch. Dist., supra*, 333 F.Supp. at 1165-1167 (partial basis of decision), supplementary injunctions vacated on other grounds, 475 F.2d 1071; *Scoville v. Bd. of Ed., supra*, 425 F.2d at 14 (appropriate to compare content of books in school library).[32]

The inconsistency doctrine is a potent, widely available weapon. In the *Vail* case, for example, a comparison of the content of the underground paper (*The Strawberry Grenade*) and materials from the school program revealed the following:

> *Love Story*, Erich Segal, Signet Edition (1970)
> "For whom? I wanted to say. This guy was beginning to piss me off." (at p. 68)
>
> *Strawberry Grenade*, November 11, 1971
> "Many of us were getting pissed off." (at p. 1)
>
> *Love Story*
> "At a heated juncture, I made the unfortunate error of referring to their center as a 'fucking Canuck.'" (at p. 17)
>
> *Strawberry Grenade*, November 11, 1971
> "All I remember about the ride downtown is screaming at the pigs to please loosen the fucking handcuffs as they hurt like hell." (at p. 2)
>
> *Soul on Ice*, Eldridge Cleaver, Dell Publishing Co., Inc., (1970)
> "I'm gon' cut that fucking weed aloose." (at p. 182)
>
> *Nigger*, Dick Gregory, with Robert Lipsyte, Pocket Books (1965)
> "I'm gonna cut the balls right off this little nigger, he ain't never gonna do nothin' no more." (at p. 171)
> *Strawberry Grenade*, November 11, 1971
> "So I hit him in the balls." (at p. 3)
>
> *Nigger*
> "Dare any dirty mother-fucker in this place to come and stop me from stomping this bitch. Hear?" (at p. 22)
>
> *Strawberry Grenade*, November 11, 1971 "You've had it now motherfucker!" (at p. 3)

Particular words at issue in *Vail* were also defined in standard reference works.[33] A list of books and other publications and materials which have been used in challenging obscenity charges appears in the footnote.[34]

After the Supreme Court's reversal in the *Papish* case, *Baker v. Downey City Bd. of Ed., supra*, stands alone in ruling punishment permissible for material not found legally obscene. High school students received ten-day suspensions for "profanity or vulgarity" after distributing 450 copies of *Oink*, an underground paper, to students entering the campus. Offending material included "four letter words" and other profanity in an article by Jerry Farber, "The Student as Nigger," and the "vulgar retouching" of a photograph of President Nixon (adding an extended middle finger to a closed hand). This photograph was captioned: "Here's A Little Something For You Justice." (307 F.Supp. at 520, 529-530.)

The *Baker* court's rationale for denying the free speech claim was similar to that of the court of appeals majority in *Papish*:[35]

> Neither 'pornography' nor 'obscenity,' as defined by law, need

> be established to constitute a violation of the rules against profanity or vulgarity, or as a reason for interference with discipline, or to justify the apprehension of experienced school administrators as to the impairment of the school's educational process in the instant case. *Ginsberg v. New York*, 390 U.S. 629. . .
>
> ***
>
> ... plaintiff's First Amendment rights to free speech do not require the suspension of decency in the expression of their views and ideas....
> (308 F.Supp. at 526-527.)

The court also stated that high school students' "right to criticize and dissent" may be "more strictly curtailed" than college students' or adults.' (307 F.Supp. at 527.)

The recent Supreme Court obscenity cases should not affect the foregoing decisions. In *Miller v. California*,, 93 S.Ct. 2607, 2615 (1973), the Court held that obscene materials are "works which, taken as whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." Later in the opinion, the Court referred to "the public portrayal of hard core sexual conduct for its own sake, and for the ensuing commercial gain...." (93 S.Ct. at 1621.) Students have not produced such material.

Libel

Dicta in the federal cases frequently state that libelous material is unprotected. *E.g., Shanley, supra*, 462 F.2d at 971; Fujishima, *supra*, 460 F.2d at 1359. Two federal decisions add that libel claims must be judged by the standards of *New York Times v. Sullivan*, 376 U.S. 254 (1964). See *Baughman v. Freienmuth, supra*, 478 F.2d at 1351; *Trujillo v. Love*, 322 F.Supp. 1266, 1271 (D. Colo., 1971) (college newspaper).

In the *N.Y. Times* case, the Court stated (376 U.S. at 279-280):

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Applying this standard to an editorial advertisement, the Court held that "the proof presented to show actual malice lack[ed] the convincing clarity which the constitutional standard demands. . . ." (376 U.S. at 285-286.)

The *New York Times* rule was in part the basis for the dismissal of a libel action in *Scelfo v. Rutgers University*, 282 A.2d 445 (N.J. Superior Ct., 1971). There, a student wrote an article describing a YAF-SDS confrontation and submitted it to the undergraduate newspaper. It was published with a headline reading: "YAF's, Cops, Rightists: Racist Pig Bastards." The court dismissed the suit for three reasons: (1) failure of the article to identify the two policemen who sued the student author and the university; (2) the absence of proof of damage to the plaintiffs' reputations; and (3) the policemen were public officials, but "neither pleaded nor presented any evidence of 'actual malice' " as required by the *Times* case. (282 A.2d at 449-451.)

6. Criticism of School Officials and Advocacy of Violation of School rules

A limited number of the distribution cases concern the complex questions of criticism and advocacy. Dicta in two cases state that broad prohibitions on distribution may not be justified by fear that student publications will be critical of school officials. *Shanley, supra*, 462 F.2d at 972, n. 10; *Rowe v. Campbell Union High School Dist., supra*, Mem. Op. at 9.[36] There are holdings on one or both issues in *Matter of Brociner*, 11 N.Y. Ed. Rept. 204 (1972); *Sullivan v. Houston Ind. Sch. Dist., supra; Scoville v. Bd. of Ed.; and Norton v. Disc. Comm. of East Tenn. State Univ., supra.*

Brociner is interesting because New York's Commissioner of Education who decided the case is an educator rather than an "intruder," *i.e.*, a judge. There, students were suspended for distributing an underground paper containing an article with advice for incoming

freshman students. In the words of the commissioner (at 205):

> The 'advice' includes a list of 'do's' and 'don'ts' 'to help make your stay more pleasurable and to drive the administration crazy' and includes suggestions that the students learn to steal passes and to forge teacher's signatures upon the pass, to lie with a straight face, to sign their own absence excuse notes and to 'do your part to drive the "Wheels" up the wall.'

The critical factor in the decision was the Commissioner's finding that the article was intended as satire,[37] and that "satire, however inept" is protected by "constitutional guarantees" and "the dictates of sound educational policy." (at 205.) The opinion also notes "a complete absence of proof that any students were influenced by the article to do or to attempt the acts suggested." (at 207.)

In *Sullivan, supra,* the court stated that a speech by a "hypothetical administrator" in an underground paper "[did] appear to hold school officials up to ridicule. . . ." It could not be suppressed, however, because it did not contain "fighting words," libel or obscenity. (307 F.Supp. at 1341-1342.)

Scoville and *Norton* deal with criticism and advocacy by students who were expelled or suspended. Students prevailed in *Scoville* and the administration in *Norton.* In view of the advocacy issue, it is useful to discuss initially the more recent Supreme Court decision in *Healey v. James, supra,* concerning a college's refusal to recognize an SDS chapter. In part, the court found no substantial evidentiary basis for concluding that the chapter would be a disruptive influence. It expressed the legal standard as follows (92 S.Ct. at 2350):

> The critical line heretofore drawn for determining the permissibility of regulation is the line between mere advocacy and advocacy 'directed to inciting or producing imminent lawless action and. . .likely to incite or produce such action.' *Brandenburg v. Ohio* 395 U.S. 444, 447 (1969) (unanimous *per curiam* opinion). See also *Scales v. United States,* 367 U.S. 203, 230-232 (1961); *Noto v. United States,* 367 U.S. 289, 298 (1961); *Yates v. United States,* 354 U.S. 298 (1957). In the context of the 'special characteristics of the school environment,' the power of the government to prohibit 'lawless action' is not limited to acts of a criminal nature. Also prohibitable are actions which 'materially and substantially disrupt the work and discipline of the school.' *Tinker v. Des Moines Independent Community School District,* 393 U.S., at 513.

See also *Stacy v. Williams,* 306 F.Supp. 963, 972-974, 977 (N.D. Miss., 1969) (3 Judge Ct.) (right to invite speakers).

A summary of *Scoville* appears above at page 65. There, students harshly criticized school policies and a dean, and urged other students to destroy or not accept materials given out by administrators. The court of appeals ruled for students because it found no evidence of actual disruption, and viewed the criticism (although "disrespectful and tasteless") and advocacy as insufficient to support a reasonable forecast of disruption. (425 F.2d at 14.) The *Norton* case is summarized above at page 67. The court found that administrators had reasonably forecast disruption. In the court's view, some of the student literature encouraged disruptive demonstrations. (419 F.2d 197.) The court also referred to exhortations to students "to stand up and fight" and to "assault the bastions of administrative tyranny." These the court characterized as "open exhortation to the students to engage in disorderly and destructive activities." (410 F.2d at 198.)

In one sense, *Scoville* and *Norton* are consistent. Neither case stops with criticism and advocacy; each searches for evidence of their impact. Finding none, *Scoville* ruled for the students. However, since *Norton* rested primarily on testimony of what "could conceivably" and "might" happen, this is not a real distinction. Even in the absence of testimony, the court of appeals in *Scoville* could have inferred that disruption was "conceivable" and "might" happen. The real

difference — manifest in the courts' contrasting choice of language to describe student expression — was in the philosophy of judges. This note suggests that *Norton* did not properly apply the *Tinker* disruption standard. See page 67, *supra*. In addition, given the indication in the *Healey* case that advocacy must be tested by the standard set forth in *Brandenburg*, the *Norton* decision is questionable on another ground. The university officials did not testify that distribution was "likely to incite or produce" disruption of the school program.[38]

7. Anonymity

In *Talley v. California*, 362 U.S. 60 (1960), the Supreme Court held invalid on its face an ordinance forbidding distribution of handbills not containing the name and address of the writer and/or distributor. The court reasoned, in part (362 U.S. at 64):

> Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all.

The anonymity issue has arisen in three distribution cases. *Rowe v. Campbell Union High Sch. Dist., supra*, Mem. Op. at 11 (required identification of publisher conceded to be invalid); *Jacobs v. Bd. of Sch. Commissioners, supra*, 349 F.Supp. at 608, 612 (requirement of including name of "every person or organization" participating in publication; invalid "as requiring prior censorship and restraint"); *Matter of Schiener*, 11 N.Y. Ed. Rept., 293, 294-295 (1972, N.Y. Comm'er of Ed.) (requirement of listing names of authors, publishers, editors and contributing writers upheld as a requirement of "responsible journalism"; no citation of *Talley*).[39]

The *Talley* rationale for anonymity is applicable to students. Criticism of administrators by students is unlikely to be viewed by either side in the same way as clearly acceptable criticism, for example, by a citizen or an elected official. If anonymity is permitted, more student criticism can be expected. Dissenting justices in *Talley* argued that the majority failed to distinguish situations where identification requirements had been upheld (newspapers must publish names of editor and others; lobbyists must disclose identity and other information) or were common (anonymous literature on political candidates forbidden, *e.g.*, 18 U.S.C. 612). See 362 U.S. at 70. After *Talley*, courts have reached different conclusions on laws forbidding anonymous campaign literature. Compare *United States v. Scott*, 195 F.Supp. 440 (D.N.D., 1961) (18 U.S.C. 612 upheld) and *Zwickler v. Koota*, 290 F.Supp. 244 (E.D.N.Y., 1968) (New York law invalidated), dismissal of complaint directed for failure to establish basis for declaratory relief, 394 U.S. 103 (1969).

In sum, while *Talley* provides strong support for an argument, its precise scope is unclear. The majority opinion in *Talley* stated that the ordinance was not narrowly limited to deal with the asserted policy goals of the legislators, *i.e.*, "to identify those responsible for frauds, false advertising and libel." (362 U.S. at 64.) It may be therefore that if anonymous literature creates some specific problem in a school, a rule narrowly drawn to address that problem will be upheld.

SCHOOL-SPONSORED MATERIALS

1. Attempts to Censor School-Sponsored Publications

Courts have not given officials greater discretion where publications were school-sponsored or funded. In seven cases, college or high school students have successfully challenged censorship attempts.

In *Trujillo v. Love*, 322 F.Supp. 1266 (D. Colo., 1971), the paid managing editor of a college-sponsored and funded paper was suspended after the faculty advisor, on grounds of ethics and potential libel, refused to approve editorials which criticized sarcastically the college president and a local judge. The court stated in part (322 F.Supp. at 1270):

> The state is not necessarily the unfettered master of all it creates. Having established a particular forum for expression, officials may not then place limitations upon the use of that forum which interfere with

> protected speech and are not unjustified [*sic*] by an overriding state interest. Antonnelli v. Hammond, 308 F.Supp. 1329 (D.Mass. 1970); Zucker v. Panitz, 299 F.Supp. 102 (S.D.N.Y. 1969); Dickey v. Alabama State Board of Education, 273 F.Supp. 613 (M.D. Ala. 1967); Wirta v. Alameda-Contra Costa Transit District, 68 Cal. 2d 51. . . (1967). In the context of an educational institution, a prohibition on protected speech, to be valid, must be 'necessary to avoid material and substantial interference with schoolwork or discipline.' Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 511. . . (1969).

The court found no evidence of disruption, or proof of libel, noting that any libel claim must satisfy federal constitutional standards. The court directed plaintiff's reinstatement with back pay. (322 F.Supp. at 1271.)

Antonelli v. Hammond, 308 F.Supp. 1329 (D.Mass., 1970), cited in *Trujillo*, applied similar standards in declaring unconstitutional a procedure for prior review of material to be published in a college paper supported by revenue from a compulsory student activity fee. The court: (1) held that the review procedure did not comport with the standards of *Freedman v. Maryland*, 380 U.S. 51 (1965), and questioned whether any prior restraint of a weekly newspaper would be permissible (308 F.Supp. at 1335-1336 and n. 6); (2) found "no showing that the harm done from obscenity in a college setting is so much greater than in the public forum that it outweighs the danger to free expression inherent in censorship without procedural safeguards" (308 F.Supp. at 1336); and (3) concluded that "the creation of the form [of expression] does not give birth also to the power to mold its substance." (308 F.Supp. at 1337.) See also *Dickey v. Alabama St. Bd. of Ed.*, 272 F.Supp. 613 (M.D. Ala., 1967), vacated as moot sub nom. *Troy State Univ. v. Dickey*, 402 F.2d 515 (C.A. 5, 1968) (student-editor suspended for disregarding instruction on content of weekly college paper; reinstatement ordered, in part, because official action unrelated to "maintenance of order and discipline....").

Students have prevailed even where their attacks focused on religion and the American flag. In *Panarella v. Birenbaum*, 343 N.Y.S.2d 333 (1973), New York's Court of Appeals rejected the claim that the publication in two college-funded student newspapers of articles harshly critical of certain religious views violated the First Amendment's establishment of religion clause.[40] Each school's paper printed one article; one paper also printed letters critical of the article. The court noted the absence of evidence of a religious purpose, the secular objectives advanced by the papers, the absence of repeated attacks and the absence of a policy of excluding contrary views.[41] In *Korn v. Elkins*, 317 F.Supp. 138 (D.Md., 1970), University of Maryland officials refused to permit publication of a picture of a burning American flag on the cover of a "student feature magazine." The Maryland Attorney General had informed them that publication would violate the state's flag desecration law. The court majority held that the law had been unconstitutionally applied, principally because of the absence of evidence that suppression was "necessary to preserve order and discipline. . . ." (317 F.Supp. at 142.)

Censorship efforts also failed in two high school cases. In *Koppell v. Levine*, 347 F.Supp. 456 (E.D.N.Y., 1972), a principal impounded copies of a high school-affiliated literary magazine as obscene. A story used "four letter words" and referred to "a movie scene where a couple 'fell into bed.' " The court found the content of the magazine to be protected by free speech guarantees in part because it contained "no extended narrative. . .constituting a predominant appeal to prurient interest" and because it was not "patently offensive. . .as evidenced by comparable material appearing in respectable national periodicals and literature contained in the high school library."[42] In addition, the court held that the review procedure did not comport with the standards of *Freedman, supra*. The court's order allowed non-disruptive distribution on school property and permitted officials to stamp each copy to disclaim responsibility for content. (347 F.Supp. at 460.)

In *Wesolek v. Bd. of Trustees*, C.A. No. 73-

S-101 (N.D. Ind.) (Clearinghouse Review Nos. 10376A and B), the faculty advisor and school authorities refused to permit a high school newspaper to publish an article on birth control prepared by its editor. Their action was allegedly based on the article's controversial topic. Finding irreparable injury because of the plaintiff's impending graduation and imminent publication of the year's last issue of the paper, the court entered a temporary restraining order requiring publication of the article. The order states, in part: "Defendants have not claimed that the article is libelous, obscene or would create a material and substantial disruption of school activities."

Trujillo and *Koppell, supra,* suggest that there may be circumstances in which greater supervision of content would be permissible. *Trujillo* refers to a paper established and placed under the control of a journalism department as an instructional tool, and *Koppell* to "publications bearing the school's name, or on which school funds were about to be expended or materials or facilities employed. . . ." See 322 F.Supp. at 1270, 347 F.Supp. at 460.

2. Access to School-Sponsored Publications

In two cases, courts have ordered that school papers accept for publication editorial advertisements submitted by students. See *Zucker v. Panitz,* 299 F.Supp. 102 (S.D.N.Y., 1969); *Lee v. Bd. of Regents,* 441 F.2d 1257 (C.A. 7, 1971).

In *Zucker,* a principal refused to allow publication of a paid advertisement opposing the Vietnam War. The paper had accepted "purely commercial advertising," and published news articles on "controversial topics," including the war. The court rejected — in effect, as an inadequate distinction — defendants' contention that their action was proper "since no advertising on political matters is permitted...." (299 F.Supp. at 104.) A claim that students had "no right of access" was also unavailing since "the paper appears to have been open to free expression of ideas in the news and editorial columns as well as in letters to the editor." (299 F.Supp. at 104-105.)

A college newspaper board refused in *Lee* to accept three advertisements which supported a university employees' union and opposed racial discrimination and the Vietnam War. The board viewed the advertisements as without the scope of its policy which allowed material on a commercial product, a commercial service, a meeting, a political candidate or a public service. The court held the board's action inconsistent with "the proposition that a state public body which disseminates paid advertising of a commercial type may not reject other paid advertising on the basis that it is editorial in character." (441 F.2d at 1259.) The court rejected the contention that the policy constituted a "reasonable means" of avoiding embarrassment and difficult judgment on material which "may be" obscene, libelous or subversive. This the court viewed as the "undifferentiated fear" rejected in *Tinker.*

The reasoning in *Zucker* and *Lee* generally follows that of subsequent cases holding that free speech and equal protection guarantees require that "justifications for selective exclusions from a public forum must be carefully scrutinized" and such exclusions "tailored to serve a substantial governmental interest." *Police Dept. of Chicago v. Mosley,* 92 S.Ct. 2286, 2292 (1972) (invalidating ordinance prohibiting all picketing within 150 feet of a school except for peaceful labor picketing); *People Acting Through Community Effort v. Doorley,* 468 F.2d 1143 (C.A. 1, 1973) (invalidating ordinance prohibiting residential picketing except in certain labor disputes); *Bonner-Lyons v. School Committee,* 480 F.2d 442 (C.A. 1, 1973) (finding impermissible discrimination by school committee in access of citizens' groups to internal system for disseminating notices).

The access principle seems applicable to more than publications, once a forum, however unusual, has been opened.[43] Additional examples include the inviting of outside speakers and the use of school equipment and paper.

REMEDIAL PRINCIPLES

The courts have recognized that the suppression of First Amendment activity causes irreparable injury. Temporary restraining orders have been entered [*Wesolek, supra* (expedite publication of article); *De Anza High School Students, supra* (prevent interference with non-disruptive distribution); *Mt. Eden High School Students, supra* (same)] and relief

pending appeal granted. *Riseman, supra,* 439 F.2d at 149; *Quarterman, supra,* 453 F.2d at 56; *Shanley, supra,* 462 F.2d at 967.

Courts have directed steps to eliminate the effects of punishment for conduct held protected.

— In *Papish, supra,* the Supreme Court directed reinstatement of plaintiff, absent a proper academic reason, and restoration of any credits earned but withheld. (93 S.Ct. at 1200.) See also *Dickey, supra,* 273 F.Supp. at 619 (reinstatement); *Trujillo, supra,* 322 F.Supp. at 1271 (reinstatement to position as managing editor of college paper and back pay).

— Expunge mention of sanction from school records. *Quarterman, supra,* 453 F.2d at 60-61; *Fujishima, supra,* 460 F.2d at 1359; *Vail, supra,* 354 F.2d at 604 (also on behalf of class and counsel permitted to examine records to verify); *Matter of Brociner,* 11 N.Y. Ed. Rept. 204, 205 (N.Y. Comm'er of Ed., 1972).

— Allow make-up work. *Sullivan, supra,* 307 F.Supp. at 1356; *Shanley, supra,* 462 F.2d at 975.

— Remove zeroes given for work missed and/or study and report to court impact if any of sanction on grades and feasibility of correcting. *Shanley, supra,* 462 F.2d at 975 (eliminate zeroes); *Vail, supra,* 354 F.Supp. at 604 (study and report).

— Give notice of the court's action to class members. *Fujishima, supra,* 460 F.2d at 1360; *Vail, supra,* 354 F.Supp. at 604 (also individual notice to students whose records are expunged).

In *Riseman, supra,* the court set forth a rule to govern distribution; it allowed modification by reasonable requirements of time, place and manner. (439 F.2d at 149, n. 2) See also *Sullivan, supra,* 333 F.Supp. at 1152-1153 (order containing criteria to govern new rule); *Rowe v. Campbell Union High Sch. Dist., supra,* Mem. Op. at 12-13 (system to submit revised regulation to court within 90 days).

In *Koppell v. Levine, supra,* the Court directed the return of materials which had been confiscated improperly. (349 F.Supp. at 460.)[44]

CONCLUSION

Tinker rejected an absolute approach. The Court stated that students do not "shed their constitutional rights to freedom of speech. . . at the schoolhouse gate," but also affirmed "the comprehensive authority" of school officials "to prescribe and control conduct in the schools." (393 U.S. at 506, 507.) First Amendment rights were to be available "applied in light of the special characteristics of the school environment. . . ." (393 U.S. at 506.) Implicitly at least, this language suggested that in view of the compulsory attendance laws, the purposes of education and the nature of school facilities, school grounds and buildings were not the same as a park, for example, with respect to the exercise of First Amendment rights. (See *Shanley, supra,* 462 F.2d at 968-969.) The distribution and other cases discussed in this note, most decided in the more than four years since the *Tinker* decision, provide a basis for framing some conclusions on the impact on traditional free speech principles of schools' "special characteristics."

First, there has not been a strong tendency to dilute the body of free expression law. The principal exception is the majority rule permitting prior review of content (*Eisner, Quarterman* and *Shanley, supra*); however, two circuits have not allowed this prior restraint (*Riseman, Fujishima, supra*). *Baker, supra,* upheld sanctions for material not ruled legally obscene. This is a minority view (*Vail, Sullivan, Fujishima, Jacobs, Papish, supra*). *Schwartz* and *Graham, supra,* seem to exclude challenges to the facial validity of a policy, but many more cases allow such attacks *(e.g., Quarterman, Eisner, Fujishima, Baughman, Vail, supra).*

Ready opportunities for diluting principles have not been accepted. For example, in *Papish, supra,* the majority applied the technical definition of obscenity, and held, in part, that materials were not obscene. Chief Justice Burger dissented, and argued in support of upholding the expulsion: "In theory, at least, a university is not merely an arena for the discussion of ideas by students and faculty; it is also an institution where individuals learn to express themselves in acceptable, civil terms." (93 S.Ct. at 1200.) This view has not prevailed. Materials critical of school personnel have generally not been barred on the ground that they would necessarily undermine administrators' ability to control schools (but see *Norton, supra,* 419 F.2d at 198). Censorship of

school-sponsored and funded publications has not been permitted.

There are two additional indicia of the extent to which free expression principles have been applied with full force. In *Healey v. James, supra,* the case on a college's non-recognition of an SDS chapter, Justice Rehnquist concurred in the judgment in a separate and individual opinion. He argued that "[p]rior cases dealing with First Amendment rights are not fungible goods," that "school administrator[s] may impose upon. . .students reasonable regulations that would be impermissible if imposed by the government for all citizens" and that "some of the language used by the Court tends to obscure [this distinction]. . . ." (92 S.Ct. at 2357.) In *Shanley, supra,* the court expressly stated that speech in the school context could be subjected to greater than normal restriction, and upheld prior review in principle. (462 F.2d at 969.) However, the remainder of the decision forcefully applies a number of traditional standards.

Second, given the refusal of the majority of courts to expand the limited areas in which officials may forbid or punish expression irrespective of impact (*e.g.,* obscenity), the *Tinker* disruption-disorder standard allows considerable latitude for expression. There are few distribution cases in which officials have even attempted to establish actual disruption (*Sullivan, Baker, Norton, supra*). There would appear, therefore, to be considerable opportunities for distribution before "material" disruption, "substantial" disorder or "invasion" of others' rights. For example, in the *Vail* case, *supra,* evidence adduced in support of a challenge to a revised distribution rule indicated that students had a free period each day during which they had been allowed to gather and converse in a number of areas. Distribution in free periods and before and after school would create a broad opportunity for expression, without apparent disruption.

Third, students constitute a large part of our population and they spend much time in schools. Any dilution of free speech guarantees has, therefore, a very substantial impact. Furthermore, school is likely to be the first contact which students have with persons subject to free expression requirements. Less than "scrupulous protection of Constitutional freedoms" may well "strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *West Virginia St. Bd. of Ed. v. Barnette,* 319 U.S. 624, 637 (1943). See also *Shanley, supra,* 462 F.2d at 972-973.

Footnotes

[1] Two pertinent cases are now on appeal. The Fifth Circuit has agreed to rehear *en banc Bazaar v. Fortune,* 476 F.2d 570 (C.A. 5, 1973). The initial panel had held unanimously that a university's attempted censorship of a student publication was improper. The panel's careful decision is worth reading for background material. *Vail v. Bd. of Ed.,* 354 F.Supp. 592 (D.N.H., 1973) has been argued in the First Circuit. In pertinent part, the appeal concerns the validity of the system's revised distribution rule adopted after the reported decision. Portions of the *Vail* decision not involved in the appeal are discussed here.

[2] A reformulation of the standard has been often cited in subsequent opinions (393 U.S. at 514, emphasis added):

> As we have discussed, the record does not demonstrate *any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities,* and no disturbances or disorders on the school premises in fact occurred.

[3] *Papish v. Bd. of Curators, supra,* 93 S.Ct. at 1199-1200 at n. 6; *Shanley, supra,* 462 F.2d at 970-975; *Fujishima v. Bd. of Ed.,* 460 F.2d 1355, 1359 (C.A. 7, 1972); *Scoville, supra,* 425 F.2d at 13-14; *Sullivan v. Houston Ind. Sch. Dist.,* 307 F.Supp. 1328, 1341, 1355-1356 (S.D. Tex., 1969); *Channing Club v. Bd. of Regents,* 317 F.Supp. 688, 691 (N.D. Tex., 1970); *Matter of Brociner,* 11 N.Y. Ed. Rep. 204, 207 (1972, N.Y. Comm'er of Ed.).

[4] *Norton v. Disc. Comm. of East Tenn. State Univ.,* 419 F.2d 195, 199 (C.A. 6, 1969), cert. denied, 399 U.S. 906 (1970); *Baker v. Downey City Bd. of Ed.,* 307 F Supp. 517, 522 (C.D. Cal., 1969).

[5] See also *Jones v. Bd. of Regents,* 436 F.2d 618, 620-621 (C.A. 9, 1970) (invalidating a regulation based on similar pre-*Tinker* standards); *Joy v. Yankowski,* C.A. No. 71-C-489 (E.D.N.Y., July 12, 1971) (consent order providing in part: "That defendants will not interfere with or keep records of students who distribute literature on school property so long as such distribution does not materially and substantially interfere with normal school activities.") *DeAnza High School Students v. Richmond Unified Sch. Dist.,* C.A. No. C-70-1074 (N.D. Cal., Nov. 20, 1970) (order granting preliminary injunction; same rule as *Joy*); *Mt. Eden High School Students v. Hayward Unified Sch. Dist.,* C.A. No. C-70-1173 (N.D. Cal., June 4, 1970) (T.R.O., same rule as *Joy*). In *Sullivan, supra,* the court found the rule upon which discipline was based unconstitutionally overboard. (307 F.Supp. at 1343-1346.)

Courtesy: Education Development Center, Inc.

[6] "*In order for the State* in the person of school officials *to justify prohibition* of a particular expression of opinion, *it must be able to show* that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." (393 U.S. at 509; emphasis added.)

[7] See also *Tinker, supra,* 393 U.S. at 509-510.

[8] The cases show that this principle will have many applications. See cases on obscenity at page 72 *supra, Tinker, supra,* 393 U.S. at 510-511 (wearing of other symbols permitted, *e.g.,* campaign buttons); *Vail, supra,* 354 F.Supp. at 595-596 (candidates' representatives but not students permitted to distribute written materials within school); *Matter of Schiener,* 11 N.Y. Ed. Rept. 293, 294 (1972, New York Comm'er of Ed.) (granting of broader right to distribute to official paper than underground paper demonstrated "unreasonableness"); *Sullivan, supra,* 307 F.Supp. at 1340.

[9] In *Karp* school officials confiscated signs from a student. The court found that this action was based upon a reasonable forecast of disruption. The decision contains a detailed application of the *Tinker* standard. (477 F.2d at 174-176.)

[10] A note on the history of the *Sullivan* case is necessary. Students were expelled after they distributed an underground paper. The court held in part that their activity was protected under the First Amendment. See 307 F.Supp. 1328, cited *supra.* The court thereafter entered injunctive relief. Later a different student began a proceeding to enforce the injunction after he was suspended following distribution of literature. The court held that this suspension was improper, in part on free speech grounds. See 333 F.Supp. at 1149. At the beginning of this opinion, the court set forth the injunctive relief given earlier. 333 F.Supp. at 1152-1154. After the second opinion, the court granted additional injunctive relief. On appeal, the Fifth Circuit reversed as to the suspension which gave rise to the second opinion and vacated the *supplemental* injunctive relief. The Court expressly declined to vacate the original injunction. See 475 F.2d 1071. Accordingly, in this article, there are citations to the original opinion and injunction, and those parts of the second opinion not inconsistent with the Fifth Circuit ruling, with the note that the supplementary injunctions were vacated.

[11] See also *Crews v. Cloncs,* 432 F.2d 1259, 1265 (C.A. 7, 1970) ("We think a similar principle operates to protect long-hair students unless school officials have actively tried and failed to silence those persons actually engaged in disruptive conduct."); *Gregory v. Chicago,* 394 U.S. 111 (1969); *Stacy v. Williams,* 306 F.Supp. 963, 977 (N.D. Miss., 1969) (3 Judge Ct.) (right to invite speakers).

[12] See *Karp v. Becken, supra,* 477 F.2d at 176 (confiscation of protest signs upheld in view of reasonable forecast of disruption; however, officials failed to adequately justify five-day suspension).

[13] See pages 64-65, *supra.* Justice Marshall so argued in an opinion joined by Justices Douglas and Brennan in opposing the Court's denial of certiorari in *Norton.* See 399 U.S. at 908

[14] Compare *Schwartz*, 298 F.Supp. at 239-40 and *Eisner v. Stamford Bd. of Ed.*, *supra*, 440 F.2d at 808, 810-811; and *Graham*, 335 F.Supp. at 1165 and *Shanley v. Northeast Ind. Sch. Dist.*, *supra*, 462 F.2d at 976-978.

[15] A number of cases have held that a sanction cannot be sustained if generally based on conduct which involved both protected and unprotected activity. See *Street v. New York*, 394 U.S. 576, 585-588 (1969), and cases there cited; *Karp v. Becken*, *supra*, 477 F.2d at 176 (student rights case). Other cases have held that a sanction based upon an unconstitutional rule cannot be sustained even if the underlying conduct could be prohibited by a proper rule. See *Gooding v. Wilson*, 92 S.Ct. 1103, 1105 (1972); *Dickey v. Alabama St. Bd. of Ed.*, 273 F.Supp. 613, 618 (M.D. Ala., 1967) (student rights case; exclusion may not be justified by terming "insubordination" an exercise of constitutional rights), vacated as moot sub nom. *Troy St. Univ. v. Dickey*, 402 F.2d 515 (C.A. 5, 1968); *Quarterman v. Byrd*, *supra*, 453 F.2d at 57 (distribution regulation held facially defective although court characterized student publication as "inflammatory and potentially disruptive").

[16] See *Evers v. Dwyer*, 358 U.S. 202, 204 (1958) ("That the appellant may have boarded this particular bus for the purpose of instituting this litigation is not significant.") ("flouting" of law requiring racially segregated seating on busses.)

[17] Prior review requirements are discussed below at page 70.

[18] For the purpose of this analysis, it is significant that the court *viewed* the rule as constitutional. While it is unclear whether this conclusion was intended to apply to more than the prior review requirement, other cases discussed in this note at the pages indicated suggest defects in other parts of the rule: standards (p. 70), limitation to before and after school (p. 69), sale (p. 69) and names (p. 76). Forbidding "political campaign material" is also questionable. In *Mills v. Alabama*, 384 U.S. 214, 218-219 (1966), the Court stated that "a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs" including "candidates. . .and all. . .matters relating to political processes." See also *Stacy v. Williams*, 306 F.Supp. 963, 974-975 (N.D.Miss., 1969) (3 Judge Ct.) (right to invite speakers).

[19] The fact that materials were sold was not an issue in *Scoville*, *supra*.

[20] *Tinker* provides some guidance on the place of distribution. It refers to "the cafeteria," "the playing field" and "the campus during the authorized hours." The decision also discussed the inadequacy of sham opportunities for expression. See discussion at page 64, *supra*.

[21] Relief in accord with *Riseman* was entered in *Mello v. Sch. Comm. of New Bedford*, C.A. No. 72-1146 (D.Mass., Order, April 6, 1972.) The appeal to the First Circuit in the *Vail* case (*supra* at n. 1) deals in part with the place of distribution. After the reported decision, the system adopted a revised rule limiting distribution to: (1) a table in the corner of the library, and (2) the school grounds for thirty minutes after the end of the school day. The latter opportunity is limited since a majority of students leave on busses five minutes after school ends.

[22] See also *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939).

[23] "Obviously, the first amendment does not require that students be allowed to read newspapers during class periods. Nor should loud speeches be tolerated in the halls during class time. A proper regulation as to 'place' might reasonably prohibit all discussion in the school library." (307 F.Supp. at 1340.)

[24] Protection of materials is not limited to those which a court determines to be of "sufficient social importance." *Hatter v. Los Angeles City High Sch. Dist.*, 452 F.2d 673, 675 (C.A. 9, 1971).

[25] The disapproval of prior review in the *Sullivan* case, *supra*, is no longer of precedential value. See 333 F.Supp. at 1159-1161, supplemental injunctions vacated, 475 F.2d at 1076, 1078.

[26] In *Matter of Schiener*, 11 N.Y. Ed. Rept. 293, 294 (1972), New York's Commissioner of Education followed *Eisner*, approving prior review in principle but invalidating the challenged rule because of inadequate procedures and standards for review.

[27] *Shanley*, with one judge disagreeing, also found the existing policy defective because of the absence of a right of appeal from a principal's decision and to an expeditious appellate decision. (462 F.2d at 977-978.)

[28] *Eisner*, *supra*, 440 F.2d at 807; *Quarterman*, *supra*, 453 F.2d at 58.

[29] See n. 2 at page 80, *supra*.

[30] In *Cohen v. California*, 403 U.S. 15 (1971), the Court in a 5-4 decision reversed a conviction for "offensive conduct." Cohen had entered a court house where women and children were present wearing a jacket with the words "Fuck the Draft" on the back. The Court held, in part, that the words were not "in some significant way, erotic" and, therefore, not obscene. (403 U.S. at 20.)

[31] See also *Koppell v. Levine*, 347 F.Supp. 456, 458-459 (E.D.N.Y., 1972) and *Antonelli v. Hammond*, 308 F.Supp. 1329, 1332 (D.Mass., 1970), cases involving school-sponsored publications discussed below at page 77.

[32] The Eighth Circuit majority refused to rely on the inconsistency doctrine in the *Papish* case. See 464 F.2d at 144 and n. 18. The dissenting judge appeared to disagree. (464 F.2d at 146 and n. 1.) In the view it took of the case, the Supreme Court did not reach the issue in reversing. See page 72, *supra*.

[11] *E.g., American Heritage Dictionary of the English Language*, American Heritage Publishing Co., Inc., 1969: "fucking, adj. Vulgar Slang. Damned. Used as an intensive. adv. Vulgar Slang. Very. Used as an intensive." (at p. 531.) *Dictionary of American Slang*, Wentworth and Flexner, Crowell Co., 1967: "pissed off – angry; enraged; disgusted; completely and thoroughly exhausted; fed up; unhappy; forlorn." (at p. 393.)

[12] *Another Country* by James Baldwin; *In Cold Blood* by Truman Capote; *Love Story* by Erich Segal; *Nigger* by Dick Gregory; *Portnoy's Complaint* by Phillip Roth; *Prisoner of Sex* by Norman Mailer; *Soul On Ice* by Eldridge Cleaver; *The Catcher in the Rye* by J.D. Salinger; *The Confessions of Nat Turner* by William Styron; *The Tenants* by Bernard Malamud; *Ulysses* by James Joyce; Works of William Faulkner; *Atlantic Monthly*, September, 1969, "The Young and the Old"; *Harper's Magazine*, April, 1969, pages 82, 84; *Harper's Magazine*, January, 1970, "Confessions of a White Racist"; *National Review*, July 14, 1970; *The New Republic*, October 11, 1969; "Hair," recorded lyrics.

[13] *Baker* was cited in *Papish*. See 464 F.2d at 145 n. 20.

[14] Dissenting in *Papish*, Chief Justice Burger stated, in part: "Students are, of course, free to criticize the university, its faculty, or the government in vigorous or even harsh terms." (93 S.Ct. at 1200.) In *Baughman, supra*, the court stated that officials may not under the guise of vague labels "choke off criticism whether of themselves, or of school policies which they find disrespectful, tasteless or offensive." (478 F.2d at 1351.) See also *New York Times Co. v. Sullivan, supra*, 376 U.S. at 270-273.

[15] ". . .it is nevertheless apparent to me that the piece was written as a work of satire rather than as a serious exhortation. . . ." (at 205.)

[16] The cases on student criticism have not discussed the applicability of the doctrine of *Pickering v. Bd. of Ed.*, 391 U.S. 563 (1968). There, the Court overturned the dismissal of a teacher who had criticized the school board and administration's handling of the raising and allocating of revenue. There was no proof of adverse impact on the educational program and the Court found that none could be inferred given the subject of the criticism. (391 U.S. at 572-573.) It also found that the information used by the teachers was not confidential and that since "[t]he statements [were] in no way directed toward any person with whom appellant would normally be in contact in the course of his daily work as a teacher" there was "no question of maintaining either discipline by immediate superiors or harmony among coworkers. . . ." (393 U.S. at 569-570 and n. 3.) In these circumstances, the court held: (1) "substantially correct" comments could not be the basis for dismissal even if "sufficiently critical in tone. . . ." (391 U.S. at 570); (2) "in a case such as this" the "false" statements found by the Court could not be a basis for dismissal unless "knowingly or recklessly made. . . ." No such showing was made. (391 U.S. at 574.) This summary shows the complexity of the *Pickering* analysis. *Pickering* also introduces another factor, stating that the system because of the employer-employee relationship had significantly different interests than in regulating the speech of the "citizenry in general." (391 U.S. at 568.) It can be argued that students are the "citizenry in general" and that there is greater latitude for student criticism.

[17] A rule may not bar materials unless written by students at the school where distribution is planned. *O'Reilly v. San Francisco Unified Sch. Dist., supra*, Mem. Op. at 2.

[18] Describing one article, the court stated: "Its tone is 'shockingly vile and offensive.' The imagery borders on the obscene, and the language, as noted, is drawn from the vocabulary of obscenity." (333 N.Y.S. 2d at 336.)

[19] The court also rejected the argument of a dissenter in a lower court that one article was "in such poor taste and so offensive to those who profess to be Christians" that the Board could adopt regulations to prevent a recurrence "in the name of enforcing decorum on campus and maintaining an efficient school system. . . ." (327 N.Y.S. 2d at 760.) The Court of Appeals held that suppression could only be justified if "necessary to avoid material and substantial interference with the requirements of order and discipline. . . ." (333 N.Y.S. 2d at 340.)

[20] In dictum, the court in *Antonelli v. Hammond, supra*, stated that the use of "four-letter words" in an article by Eldridge Cleaver did not render it obscene. (308 F.Supp. at 1332 and n. 2.)

[21] The *Bonner-Lyons* opinion reads, in part (480 F.2d at 444):

> . . .It is well settled that once a forum is opened for the expression of views, regardless of how unusual the forum, under the dual mandate of the first amendment and the equal protection clause neither the government nor any private censor may pick and choose between those views which may or may not be expressed. *See, e.g., Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972); *National Socialist White People's Party v. Ringers*, 473 F.2d 1010 (4th Cir. 1973) (en banc); *Women Strike for Peace v. Morton*, 472 F.2d 1273 (D.C. Cir. 1972); *People Acting Through Community Effort v. Doorley*, 468 F.2d 1143 (1st Cir. 1972); *United States v. Crowthers*, 456 F.2d 1074 (4th Cir. 1972).

[22] See also *Wilhelm v. Turner*, 431 F.2d 177 (C.A. 8, 1970). Iowa's Attorney General secured copies of a student paper from a printer prior to distribution. The Attorney General believed the paper obscene. The court held the papers must be returned to the student plaintiffs because seizure had not been preceded by an adversary hearing on the obscenity issue, as constitutionally required. (431 F.2d at 179-180.)

STUDENT RIGHTS

New Mass. Laws on School Records and Behavior-Modifying Drugs

Too often schools restrict parent/pupil access to school records and at the same time provide these records to various government agencies and prospective employers almost as a matter of course. A new Massachusetts law should help remedy one part of this problem as it permits access of parents (and pupils aged seventeen or over) to *all* records concerning the pupil which are maintained by the school. The exact wording of the law is:

> Every school committee shall, at the request of a parent or guardian of a pupil, or a pupil aged seventeen years or older, allow such a parent or a pupil aged seventeen years or older the right to inspect at reasonable times academic, scholastic, or any other records concerning such pupil kept or required to be kept.
>
> M.G.L. Chapter 71, s.82
> (signed by Governor 9/17/73)

When parent/pupil access to school records is denied or unreasonably restricted, or when others have access to information which should be kept confidential, state statutes, regulations, and case law should be checked. Legal services attorneys can obtain an eight page summary of some of the case law regarding access to student records from the Center for Law and Education.

The misuse of behavior-modifying drugs on "problem children" in public schools was noted in the June 1971 (pages 2-24) and July 1973 (pages 18, 20, 32, 33) issues of *Inequality in Education*. Again, Massachusetts is attempting a statutory solution to one aspect of this problem:

> No person shall administer or cause to be administered to a pupil in any public school in the Commonwealth any psychotropic drug included on a list to be established by the department of public health unless the school has obtained certification by the commissioner of public health or his designee that the administration of such drugs in school is a legitimate medical need of the pupil. Administration of duly approved medication shall be carried out only by a registered nurse or a licensed physician. No person shall administer psychotropic drugs to such a pupil for the purposes of clinical research. The department of public health shall make rules and regulations setting forth a list of subject psychotropic drugs and procedures for certification.
>
> M.G.L. Chapter 71, s.54B
> (signed by Governor 9/21/73)

Prior Hearing for Short-Term Suspension Ordered

Lopez v. *Williams*, CA #71-67 (S.D. Ohio, E.D.), Clearinghouse #11,182, decision filed Sept. 17, 1973).

A recent decision by a three judge Federal panel in Ohio provides an almost irrefutable rationale for requiring a hearing prior to a suspension, irrespective of its length. In holding that a hearing is required prior to a short-term suspension the Court, in one sense, merely applied an unbroken string of Supreme Court decisions to the school suspension area,[1] but in another sense, really made a breakthrough since many lower courts had been hesitant to truly follow these Supreme Court precedents.[2]

The case, *Lopez* v. *Williams*, declared unconstitutional Sec. 3313.66 of the Ohio revised code and the suspension regulations of the Columbus Public School. Section 3313.66 basically had provided for a ten-day suspension without any hearing.

The Court initially rejected a claim by the Defendants that the *Rodriguez*[3] decision, holding education not to be a fundamental interest, somehow permitted the school authorities to deny a student an education without affording him due process. In rejecting this claim the Court stated:

> The Supreme Court's holding that

> the right to an education is not explicitly or implicitly guaranteed by the Constitution does not affect the determination of whether it is a liberty or property which cannot be interfered with by the State without the protection of due procedural safeguards. (p. 33, slip opinion)

The Court then proceeded to hold that the right to an education had uniformly been considered to be within the concept of "liberty" for due process analysis.

Once over this hurdle the Court was confronted with the standard claim that a short-term suspension is such an insignificant interference with liberty that it is undeserving of due process protections. There may be some support for a contention that a *de minimus* injury to a recognizable liberty would not result in the invocation of procedural safeguards;[4] however, the record before this Court coupled with the recognition of harm made by other Courts clearly refutes any claim that the harm resulting from a short-term suspension is *de minimus*. At trial, two prominent Ohio psychologists testified concerning the possible harm that can result from a suspension, irrespective of length. This testimony was unrefuted and the Court made specific findings of fact that, although the effects of suspension are not uniform,

> Most suspended students respond in one or more of the following ways:
>
> 1. The suspension is a blow to the student's self-esteem.
> 2. The student feels powerless and helpless.
> 3. The student views school authorities and teachers with resentment, suspicion and fear.
> 4. The student learns withdrawal as a mode of problem solving.
> 5. The student has little perception of the reasons for the suspension. He does not know what offending acts he committed.
> 6. The student is stigmatized by his teachers and school administrators as a deviant. They expect the student to be a trouble-maker in the future.
>
> A student's suspension may also result in his family and neighbors branding him a trouble-maker. Ultimately repeated suspension may result in academic failure. (p. 20, slip opinion)

These findings of harm, when added to the harms recognized in *Vail* v. *Board of Education*, 354 F. Supp. 592 (D.N.H. 1973) and other cases,[5] strongly refute any claim that a short-term suspension results in a *de minimus* injury; it clearly does not.

Once past the issue of *de minimus* injury, the Court's holding was compelled as the Court stated:

> Although suspension from school for a short period of time as opposed to a lengthy suspension or expulsion is a lesser interference with the right to education, the due process clause of the Fourteenth Amendment still cloaks the student. (p. 34, slip opinion)

Finally, the Court implicitly indicated where it believed others had gone wrong in their analysis of short-term suspensions. Other courts had permitted short-term suspensions, but had required procedural protections after a widely varying and necessarily arbitrary period of time.[6] This approach confuses the right to a prior hearing with the extent of the safeguards afforded. It is in the latter area that flexibility concepts should come into play in due process analysis, not in the former.[7] As the Lopez court case stated:

> It is important to remember that even though the interference with the liberty of a right to education is limited, the student's right treated with procedural fairness prior to a deprivation of the right to an education is not lost. The magnitude of the deprivation affects the formality and comprehensiveness of the due-process safeguards; it does not

affect the basic fact that these safeguards shield the student from arbitrary or capricious interference with his right to education. (p. 34, slip opinion)

Although the Court does not spell out in detail the procedural safeguards that must be part of a hearing prior to a short-term suspension, it does indicate rather forcefully that the hearing must be designed to elicit the truth. The usual conference at which the student is merely informed that he is to be suspended is clearly inadequate. On the other hand the Court indicated that the right to have counsel present is not required. Probably any procedure which allows the student to tell his side of the story and to present evidence and/or witnesses to a person not directly involved will meet the Court's mandate.

It should also be noted that the Court did provide for ejection of a student without a prior hearing when there is substantial disruption; however in this latter case a hearing must be given within 72 hours of the ejection.

In sum this case provides a substantial boost for proponents of hearings prior to short-term suspensions.

Footnotes

[1] See *e.g., Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820 (1969); *Goldberg* v. *Kelly*, 397 U.S. 254, 90 S.Ct. 1011 (1970); *Bell* v. *Burson*, 402 U.S. 535, 91 S.Ct. 1586 (1971); *Perry* v. *Sinderman*, 92 S.Ct. 2694 (1972); *Board of Regents of State College* v. *Roth*, 92 S.Ct. 2701 (1972).

[2] For a thorough review of the prior decisions see Pressman, 14 *Inequality in Education* 55.

[3] *San Antonio School District* v. *Rodriguez*, 93 S.Ct. 1278 (1973).

[4] See *Roth, supra*, 92 S.Ct. at 2707, 2708 n. 3.

[5] See Pressman, *supra*, pp. 55-56 for a discussion of these cases and the recognition of "collateral consequences" by various courts.

[6] "Grace periods" in which school authorities have been permitted to suspend students without prior procedural safeguards have ranged from two days, *Mills* v. *Board of Education of District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972) to twenty-five days, *Hernandez* v. *School District Number One, Denver, Colorado*, 315 F. Supp. 289 (D. Colo., 1970).

[7] See *e.g., Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886 (1961).

TITLE I

Innovative Remedy for Unsuccessful Title I Program

Nicholson v. Pittenger, No. 72-1596 (E.D. Pa., August 9, 1973).

In the broadest ruling to date in a Title I case, Chief Judge Lord ordered Pennsylvania state officials not to approve funding for any Title I applications from the Philadelphia School District unless Philadelphia complied with requirements of comparability, non-supplanting, concentration and evaluation. The court's order accompanied a sixteen page opinion setting forth its findings that the state had in the past approved the Philadelphia Title I program despite numerous violations of the Title I statute regulations and guidelines. Significantly, the court ruled favorably on plaintiffs' claims that the state had funded programs which had not demonstrated a reasonable promise of educational success based on objective evidence. The court found that the state defendant had violated Title I regulations: (1) by not requiring as a condition for program approval information indicating how extensive any specific educational deficiency was within the school system; (2) by not utilizing objective criteria to determine the likelihood that the programs would be successful; and (3) by not requiring a statement of the degree of educational change expected from each proposed Title I program. The focus on evaluation of program effectiveness and objective measurements of educational achievement mark an important new dimension in Title I litigation. Heretofore litigation has been largely concerned with issues of improper uses of Title I funds and failures to implement the parent advisory council requirement. In addition the court found that the Philadelphia Title I program was in violation of the requirement that state and local funds be expended equally in Title I and non-Title I schools. It found that the local district had used Title I funds to pay art, music and reading

teachers and aids who performed the same services in Title I schools that locally funded teachers were performing in non-Title I schools and that the program which reached 96 percent of the eligible children in the district was not sufficiently concentrated.

Following the Court's opinion the parties entered into a stipulation, approved and ordered by the Court on October 25, 1973, which provided a unique method for improving the educational quality of the Title I program. The Court appointed an evaluation and review committee composed of three compensatory education experts approved by the plaintiffs. The Committee, a majority of whose members are not from Philadelphia, will have the duty of recommending and ordering (where necessary) changes and modifications in the Title I program. It will consult with the plaintiffs and state and local school officials in reviewing program objectives, educational priorities of poor children, evaluation methods, costs of the program, allocation of staff, staff-pupil ratios and program results. Based on the foregoing reviews, the Committee will direct the modifications or elimination of existing programs and inclusion of new programs where appropriate. Should the local school district disagree with the Committee's suggestions, there is provision for an appeal to another "outside expert" (also agreeable to the plaintiffs). However, under the terms of the stipulation, "the School District shall have the burden by substantial evidence of showing that the changes, modifications or terminations required by the Committee are unwarranted."

This stipulation and order mark the first time a major city school system has lost control over the educational policy decision in the use of federal Title I funds, and provides a real opportunity for educational reform in which poor clients can have a voice.

Photo by Marianne Gontarz

CLASSIFICATION

Agreement Orders Elimination of Remaining Disproportions of Chicano Children in Mentally Retarded Classes

Diana v. *State Board of Education*, C-70 37 RFP (N.D. Cal., June 18, 1973) (stipulation and order).

[A summary of the original complaint and the initial consent agreement of February 3, 1970 appears in 3-4 *Inequality in Education* 23.]

In 1970, the plaintiffs and the California State Board of Education agreed with court approval, to new procedures for the placement of children in classes for the mentally retarded. These included testing in both English and children's primary language, the elimination of test items dependent upon vocabulary, general information, or other culturally biased verbal material, the reevaluation of previously placed Chicano and Chinese students on the basis of non-verbal test results in the primary language, the creation of a new or revised IQ test normed solely to Chicano students, and submission of an explanation from any district having a significant variance in racial or ethnic makeup between its classes for the educable mentally retarded and its total school enrollment.

In addition to evidence concerning the invalidity of the IQ tests as applied to Chicanos, the results of testing of plaintiffs in English by bilingual testers giving credit for responses in the primary language, and the harm involved in misplacement for the mentally retarded, the plaintiffs had cited a 1966-67 study showing that while Chicanos made up 13 percent of the state's school population, they comprised 26 percent of the students in classes for the mentally retarded. By 1973, the variance in most of the state's 1130 districts had been eliminated, but remained significant in approximately 235 districts. The new agreement attempts to eliminate the disparities in these remaining districts.

Under the new agreement, each of these districts with a "significant variance - (to be specified)" is required to submit a plan, including a timetable, for the elimination of the

disparities by September 1976. These plans are further to provide that the percentage of Chicanos placed in classes for the mentally retarded each year until 1976 shall not exceed the percentage in the general district population and to provide a program of special assistance for children reclassified into regular classes. The State Department of Education shall conduct an investigation of any such district in which a disparity increases in any year or in any district in which a significant variance continues or occurs after September 1976. These terms also apply to any district which produces a significant variance after the agreement was reached.

This approach, focusing on statistical disparties, is consistent with *Larry P.* v. *Riles*, 343 F. Supp. 1306 (N.D. Cal. 1972), where the court ruled that evidence showing the percentage of black students in a district's classes for the educable mentally retarded to be more than twice that of the total black enrollment was sufficient to shift the burden of demonstrating a rational relationship between the tests and the ability to learn onto the school district, a burden which it failed to meet. (For a summary of *Larry P.*, see 13 *Inequality in Education* 71.) It is also consistent with the approach developed under the equal protection clause, the 1964 Civil Rights Act, and Equal Employment Opportunity Commission guidelines to deal with employment test discrimination as evidenced by statistical racial disparities. See, for example, *Griggs v. Duke Power Company*, 401 U.S. 424, 91 S.Ct. 849, 28 L.E. 2d 158 (1971); *United States v. Georgia Power Company*, 474 F.2d 906 (5th Cir. 1973); *Baker v. Columbus Municipal Separate School District*, 329 F.Supp. 706 (N.D. Miss. 1971), *aff'd*, 462 F.2d 1112 (5th Cir. 1972.) This approach obviates the need to show any discriminatory intent on the part of the school. It would not be particularly useful, however, in challenges to testing which are not based upon a showing of discriminatory results involving race, ethnicity, sex, or (perhaps) class, nor in direct substantive challenges to school classifications and programs themselves. Further, one commentator has been critical of the transfer of quota systems from such areas as employment and jury selection to education, largely because quota systems tend to pressure existing classifications and to ignore meaningful individual differences in education needs. See David L. Kirp, *Schools as Sorters: The Constitutional and Policy Implications of Student Classification*, 121 U. Penn. L.Rev. 705, 773 (1973).

Rodriguez Distinguished in Right to Education Case

Colorado Association for Retarded Children v. Colorado, C.A. No. C-4620 (D. Colo., filed Dec. 22, 1972), motion to dismiss denied, July 13, 1973.

A three judge court has ruled that the Supreme Court's school finance decision in *San Antonio Independent School District v. Rodriquez*, 93 S.Ct. 1278 (1973), does not bar a suit to establish the constitutional right of handicapped children to receive a suitable free public education and has raised the possibility that classifications involving handicapped children may be ruled suspect.

The class action on behalf of all handicapped children in Colorado challenges statutes and regulations which result in regular enrollment for some children, special education for others, and exclusion from all public education of still others. Mandatory education for handicapped children is not required by statute until July 1, 1976, and plaintiffs allege that 60 percent of these children receive no education at present. These policies are alleged to violate equal protection, due process, and state constitutional requirements. Plaintiffs seek an order guaranteeing adequate, suitable education for all handicapped children and adequate notice and due process hearings for all classification decisions.

Following the Supreme Court's decision in *Rodriguez*, defendants filed a motion to dismiss, claiming that the right to education is not constitutionally protected. The three judge court denied the motion to dismiss and held that *Rodriguez* was distinguishable. The court noted the existence of several classifications and stated that a wealth classification, in which handicapped children in some districts receive a free education while children in other districts have only the option of private education, might also be involved. Further factual development was declared necessary in order to determine the possible existence of a suspect

class requiring strict scrutiny or, alternatively, the possibility that Colorado's classification scheme must be struck down as arbitrary and unreasonable. Eventual findings on these issues were said to hinge in part upon a determination of the state's educational needs and existing programs. The denial of the motion was also based upon the need to determine plaintiff's due process claims concerning classification procedures.

This ruling may indicate the prematurity of fears that, in the wake of *Rodriguez*, the equal protection clause provides no effective leverage in the nation's schools except where racial or sexual discrimination exists. Several possible routes left open by *Rodriguez* are implicit. First, the issue of suspect classification may be raised. (Demonstrating the existence of a suspect classification is one way to trigger strict judicial scrutiny, requiring a compelling state interest, under the equal protection clause; demonstrating the existence of a fundamental right or interest is the other.) In noting the possible existence of a suspect class, the three judge court cited the *Rodriguez* criterion for suspect classification: a group which is

> . . . . saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process. 93 S.Ct. at 1294.

(For a summary of the arguments that this special protection should be afforded to children placed in low tracks or to *all* children, as well as to handicapped children, see "School Classification: Some Legal Approaches to Labels," by Merle McClung, 14 *Inequality in Education* 17, 28.)

As noted above, even the possibility of a suspect wealth classification can be raised within certain educational contexts. The *Rodriguez* determination that there was no suspect wealth classification rested on findings that the Texas financing scheme did not discriminate "against any definable category of 'poor' people or result in the absolute deprivation of education." 93 S.Ct. at 1292.

Second, as indicated by the ruling, *Rodriguez* does not necessarily foreclose all attempts to claim a constitutional right to education. The *Rodriguez* holding that students in Texas had not been deprived of any fundamental rights was based on the court's finding that there was no failure "to provide each child with the opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and full participation in the political process." 93 S.Ct. at 1299. While this standard is most obviously applicable to total exclusion from public education, it might also be argued where, as with some of the children in Colorado, the education provided is unsuitable for teaching the child those basic skills, particularly where it is so inappropriate or inadequate that it is tantamount to an absolute denial of educational opportunity.

Third, the Colorado court's openness to the possibility that the classification scheme may be unreasonable even in the absence of strict scrutiny may indicate increasing judicial movement toward a more flexible approach to equal protection issues in which the scope of review is tied to a continuum of the importance of the interests affected. (See McClung, *supra*, at 29.) The crucial importance of education and equal educational opportunity, noted in *Brown v. Board of Education*, 347 U.S. 483, 493 (1954), and reaffirmed in *Rodriguez*, 93 S.Ct. at 1295, provides material for arguing that a finding that education is not fundamental interest should not relegate educational issues (at least outside of school finance) to the extremely limited treatment traditionally associated with "restrained review."

[For a summary and discussion of *Rodriguez*, see the case note by Thomas Flygare, 14 *Inequality in Education* 51.]

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EXCLUSION

Expulsion for Admitted Misconduct Challenged in Two Cases

The development of the legal obligations of public schools in disciplinary proceedings against students is marked by a disturbing irony: the cases stress the unique importance of education in our society and thus provide students with a due process hearing before expulsion or long-term suspension, but usually do not inquire into the validity of the punishment unless some well recognized personal right of constitutional dimensions like free speech is involved. In other words, courts usually do not question the denial of the right to education even for relatively minor offenses as long as procedural due process has been afforded. Two recent cases, both conceding misconduct by the students in question, challenge such "due process exclusions." In the first case discussed below, a state court ordered the reinstatement of a pupil because exclusion was unreasonable under state law; the second case is a class action in federal court where black students allege violations of the federal and state constitutions.

Tavano v. *Crowell*, Equity No. 32699 (Barnstable Superior Court) (opinion August 31, 1973 by Judge David Nelson, sitting in Suffolk County, Mass.).

In this case a twelve year old boy was expelled from school pursuant to a hearing in which the school committee made findings of misconduct. The boy had a lengthy record of minor offenses such as smoking cigarette in washroom, tearing page in textbook, teasing girl to point of tears, and unexcused absences. The court ignored federal constitutional arguments as it found under state law "a substantial burden upon the Committee to justify the total and permanent discharge of a twelve year old boy, whose recourse to other resources are non-existent." Although acknowledging sufficient evidence to find misconduct, the court found that the school had "exceeded what was reasonable and expected by its use of an extreme and ultimate sanction in response to those of misconduct." The boy had not been clearly apprised nor could reasonably have expected that his acts of misconduct would lead to permanent expulsion. Judge Nelson continued:

> More importantly, however, to this decision is that I find that there was substantial failure by the Committee or the school to utilize other sanctions and resources readily available to them, and under the statutes of this Commonwealth, expected to be so utilized....
>
> Clearly there is a responsibility upon the part of the respondents to provide an educational opportunity using reasonable means available. Permanent expulsion of a twelve year old student, with no alternative forms of education, a child not even of sufficient age to be legally employed, not even of sufficient age to choose other means of promoting his own interests; of an age where he is limitedly subject to the criminal codes; of a family with no financial resources or independent means; a child who obviously exhibits some psychological needs, it is the opinion of this Court that in view of the alternatives available and not yet attempted, the results here cannot be justified upon the record.

Dunlap v. Charlotte Mecklenburg Board of Education, C.A. No. 72-72 (W.D.N.C., filed April 17, 1972), consolidated with *Webster* v. *Perry*, C.A. No. C-138-WS-72 (M.D.N.C., filed May 10, 1972).

Named plaintiffs in *Dunlap* represent the disproportionate number of black students subjected to expulsion proceedings. Expelled after due process hearings for misconduct (refusal to follow orders, fighting, verbal threats against school officials, truancy), plaintiffs argue that their exclusion violates the equal protection clause of the Fourteenth Amendment and the North Carolina Constitution because, *inter alia*, the school's objectives can be satisfied by transfer of "problem students" from regular classes to alternative

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educational programs. "The rational action would be to use the hearing process to determine that a given child is not benefitting from the traditional type of education and assign the child to a different type of education." "Being classified as a discipline problem should be the signal for intensive efforts on the part of the school system, rather than being the signal for booting him or her out of the system." Defendants in *Dunlap* assert constitutional, statutory and inherent authority to discipline, suspend and exclude students. Their case rests basically upon their obligation to maintain the discipline necessary to provide an environment conducive to education. A three judge court has heard argument in the case (summer 1973), but a decision has not been handed down at this writing.

Legal services attorneys working on cases like *Tavano* and *Dunlap* can obtain an article titled "The Problem of the Due Process Exclusion" from the Center for Law and Education. This article considers the validity of "due process exclusions" from public education in light of (1) substantive due process cases, (2) *ultra vires* action, (3) equal protection and state law applied to exceptional children, and (4) standard equal protection analysis.

Legal Challenges to Educational Testing Practices*

by Paul Weckstein

Schools frequently use test scores to divide students into groups, i.e., to classify them.[1] In attempting to challenge such procedures, lawyers can draw upon a developed body of case law on testing in education, employment, and other areas. As will be seen below, an understanding of the interaction between the procedural issues of testing and the more substantive questions involved in classification is crucial.

The first step in most challenges to the use of testing involves a *prima facie* showing of discriminatory impact of the testing system. The discrimination alleged is usually in terms of race or ethnicity, but has occasionally been recognized by courts in terms of the poor as well, *Hobson*, 269 F.Supp. at 513; *Carmical*, 457 F.2d at 585,[2] and one recent case involving testing found sex discrimination, *Leisner*, 358 F.Supp. at 367.[3] All that is required for this *prima facie* case is that the testing procedures produce significant statistical disparities between the percentage of the group represented in the particular classification and its percentage in the total testing (or school) population, and there need be no evidence of any discriminatory intent (although demonstrating such intent will surely strengthen a case; see *Baker*, 462 F.2d at 1113-15). *Larry P.*, 343 F.Supp. at 1311; *Chance*, 458 F.2d at 1175; *Griggs*, 401 U.S. at 432, 91 S.Ct. at 854; *Bridgeport Guardians*, 354 F.Supp. at 786; *Carmical*, 457 F.2d at 585, 588.[4]

Upon such a *prima facie* showing, the burden shifts to those doing the testing to make some demonstration of the rationality of the testing procedures[5] thus marking a departure from traditional equal protection analysis.[6] While the absence of a showing of discriminatory intent (or *de jure* segregation) seems to have prevented most of these cases from being decided under standards of strict scrutiny,[7] the burden has nevertheless been termed "weighty," *Hobson*, 269 F.Supp. at 513, or "heavy", *Chance*, 458 F.2d at 1176. It has variously been cast in terms of showing that the test is "demonstrably a reasonable measure of job performance," *Griggs*, 401 U.S. at 431, 91 S.Ct. at 853; a rational connection with the asserted purpose or actual job requirements, *Larry P.*, 343 F.Supp. at 1311, *Western Addition*, 330 F.Supp. at 539; demonstrated to be "predictive of success on the job," *Leisner*, 358 F.Supp. at 370; a "strong showing of job relatedness," *Chance*, 330 F.Supp. at 223; "sufficiently job related to justify its use in the circumstances of this case," *Bridgeport Guardians*, 354 F.Supp. at 792; "substantially related," *Castro*, 459 F.2d at 732, *Cooper*, 467 F.2d at 839; "manifest relationship," *Griggs*, 401 U.S. at 432, 91 S.Ct. at 854, *Jacksonville Terminal*, 451 F.2d at 456, *Moody*, 474 F.2d at 138; related to "business necessity," *Hicks*, 319 F.Supp. at 319, *Moody*, 474 F.2d at 138; that "the record establish" that the test is "relevant, reliable, and free of discrimination" (with no clearer statement of burden), *Copeland*, 464 F.2d at 934.

There have been two employment cases which have used strict-scrutiny language upon a *prima facie* showing of racially discriminatory effects without requiring any showing of discriminatory intent. *Arrington*, 306 F.Supp. at 1358, found that such classifications are "suspect," thus requiring a "compelling justification" despite testing criteria which are "objectively neutral and without a background of even latent dis-

Paul Weckstein is a Research Associate at the Center for Law and Education.

* *The full citations for all cases referred to in this article are found in the* Table of Cases *which immediately follows the article.*

criminatory purpose." *Baker*, 462 F.2d at 1114, held that a test requirement or other policy which "produces such a racial distortion" is subject to "strict scrutiny" and "must be justified by an overriding purpose independent of its racial effects."[8] It is unclear, however, to what extent these cases represent a departure from the other "shifting-the-burden" cases, both because some of the latter seem to indicate, as seen above, that the burden is more than one of showing mere rational relationship of the tests to their purpose, and because the standards which the employment tests failed to meet in *Arrington* ("a relationship," 306 F.Supp. at 1358) and *Baker* ("clearly related," 462 F.2d at 1114) are hard to set apart from the standards of the other cases. *Bridgeport Guardians*, in attempting to clarify this issue, stated that the shifting-the-burden cases (citing *Chance* in particular) have actually used a standard greater than rational relationship, if somewhat less than strict scrutiny. 354 F.Supp. at 787-88. That standard is that the employer must "demonstrate by persuasive evidence that the exam is in fact job related." *Id.* at 793.

There has also been one case which declared that a testing procedure was a violation of equal protection without requiring any showing of racially or sexually discriminatory results. *Armstead*, 461 F.2d at 279. The requirement, for some teachers and teacher applicants, of obtaining a certain score on the Graduate Record Examination was held to bear no rational relation to teacher competence and therefore failed to meet even the traditional equal-protection standards, making it unnecessary for the court to inquire into the evidence that the test established a racial classification. This then seems to be the one testing case which provides the basis for an attack on classification procedures in which the group being denied equal protection is defined simply as all those rejected or classified on the basis of test results, regardless of race, class, ethnicity, or sex. Support for this approach might also be found in *American Mutual Insurance*, 426 F.2d at 1268, which held that an intelligence test could not be used alone to demonstrate mental retardation sufficient to constitute "manifest disability" (which would thus disqualify the employee's hand injury from being treated as a total disability), since there was no adequate showing of the relation of I.Q. to social maladaptation. Again, the decision did not hinge on any showing of racial discrimination.

Test Validity

For the vast majority of cases involving a *prima facie* showing of discriminatory effect, the burden of justification requires a demonstration that the test measures what it purports to measure. More particularly, when used for classification or selection, the test, it should be argued, must be shown to bear a strong relationship to the categories being used, such as special-education needs or successful employee traits and skills. Several cases have been decided simply by noting a failure to demonstrate any such test relevance. *Larry P.*, 343 F.Supp. at 1314; *Castro*, 459 F.2d at 735; *Arrington*, 306 F.Supp. at 1359; *Hicks*, 319 F.Supp. at 319; *Western Addition*, 330 F.Supp. at 540; *O'Neill*, 348 F.Supp. at 1090-91.[9] Similarly, some tests have been found to be irrelevant simply because designed for a different purpose, *Armstead*, 461 F.2d at 279, 280, or because the test measures different traits from those required for the job, *Chance*, 458 F.2d at 1174.

Analysis of most of the other cases, however, requires a more detailed understanding of issues of test validity which have developed out of the employment cases, resting strongly on *Griggs*. Although *Griggs* was decided under the EEOC provisions of the 1964 Civil Rights Act, the same standards, at least in the employment area, have been found to apply under the equal protection clause (in order to cover public employees[10]). *Baker*, 329 F.Supp. at 721; *Castro*, 459 F.2d at 732-33; *cf. Fowler*, 351 F.Supp. at 724.

The case presenting the clearest summary of the requirements for proper validation is *Georgia Power*, which explicitly addressed itself to detailing the standards demanded by *Griggs* and the EEOC guidelines, 474 F.2d at 912.[11] These standards, which the court held were not to be interpreted rigidly, *id.* at 915, include, *id.* at 912-16, differential validity (i.e., separate validation for all minorities with significant representation), significance at the 5 percent level[12] (to insure a high level of correlation; *cf. Armstead*, 461 F.2d at 280), an ade-

quate sample (covering a full range of test scores and representative proportions of all relevant population groups), and uniform test conditions. Most important is *Georgia Power*'s proviso, 474 F.2d at 912 that ". . .a test is not valid or invalid *per se*, but must be evaluated in the setting in which it is used." Thus, evidence of validated, standardized tests on a national level should not be accepted unless the testing sample, purposes, and test conditions used in that validation closely correspond to those in the local use of the test.

A distinction between content validity, in which the test measures characteristics found among persons in the particular job or category, and predictive validity, in which performance on the test is related to actual job performance, runs through several of the cases.[13] Following the EEOC guidelines, it has been held that predictive validity is required wherever it is possible. *Western Addition*, 340 F.Supp. at 1354; *Fowler*, 351 F.Supp. at 725. In two cases, *Nansemond County*, 351 F.Supp. at 203-205, and *Davis*, 348 F.Supp. at 17, content validity was explicitly held to be sufficient, with the court in *Nansemond County* noting that the EEOC guidelines allow for content validity as a standard when predictive validity is unfeasible, especially in the case of well-developed tests. In holding that defendants' showings of content validity were insufficient, however, *Western Addition*, 340 F.Supp. at 1354-56, and *Fowler*, 351 F.Supp. at 724-726, stressed that the guidelines require clear infeasibility of predictive validity before content validity will suffice, and that content validity requires a careful, detailed job analysis, which was found lacking in both cases. *See also, Bridgeport Guardians*, 354 F.Supp. at 790, 791, 792. Predictive validation itself may also require a job analysis so that the subjectivity of supervisors' performance ratings, with which the test results are correlated, is checked and given a content validation of its own. *Moody*, 474 F.2d at 139.

Within the area of predictive validity, a further distinction can be made between full predictive validation — in which, for example, all applicants for a job are tested, hiring then takes place using other methods with no concern for test scores, and then test results are correlated with job performance — and concurrent validation — in which those already hired under other standards are tested.[14] While concurrent validation may be more practical its validity is often more questionable, particularly since it may not include an adequate range of scores or performance ratings. This is one way of explaining the finding in *Jacksonville Terminal*, 451 F.2d at 456, that a demonstrated correlation of high test results with high job performance was inadequate validation in the absence of a similar demonstration of correlation between low test results and low job performance.

Other cases have dealt with specific grounds for finding lack of proper validation, some of which may be related to the *Georgia Power* standards. The test cutoff point used may often be arbitrary. *See Castro*, 459 F.2d 729; *American Mutual Insurance*, 426 F.2d at 1268.[15] A police entrance examination cannot be validated simply by showing its correlation with the results of a different examination given at the end of training unless the latter has been fully validated itself. *O'Neill*, 348 F.Supp. at 1090-91. Validation studies are inadequate when they depart from the actual test procedures in use, e.g., when weighted differently. *Georgia Power*, 474 F.2d at 917. A test may be invalid because it measures, in terms of content validity, a very small number of the traits involved in job effectiveness. *Baker*, 329 F.Supp. at 721; *Bridgeport Guardians*, 354 F.Supp. at 790; *see also Fowler*, 351 F.Supp. at 725. *Contra, Nansemond County*, 351 F.Supp. at 205. The validity of intelligence tests, particularly as a measure of mental retardation, is open to question unless given in conjunction with other measures designed to test actual adaptive ability. *American Mutual Insurance*, 426 F.2d at 1268; *cf. Larry P.*, 343 F.Supp. at 1311, 1312.[16] In school tracking, the validity of testing for purposes of single-factor grouping, in which students are assigned to one track for several subjects drawing on quite different abilities and skills, is open to challenge. *See Moses*, 330 F.Supp. at 1342-43. Failure to use tests with greater validity or less discriminatory impact, or failure to demonstrate that such alternatives are unavailable, has also been cited. *See Larry P.*, 343 F.Supp. at 1313-14; *Fowler*, 351 F.Supp. at 726; *Leisner*, 358 F.Supp. at 370.

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Test Bias

Challenging a test as biased can partly be treated as a way of questioning its validity. The interface is most clearly seen in *Hobson* v. *Hansen*, 269 F.Supp. at 514:

> Because these tests are standardized primarily on and are relevant to a white middle class group of students, they produce inaccurate and misleading test scores when given to lower class and Negro students. As a result, rather than being classified according to ability to learn, these students are in reality being classified according to their socio-economic or racial status or — more precisely — according to environmental and psychological factors which have nothing to do with innate ability.

Here the claim is that the tests, because of unfairness in their construction, misclassify the members of certain groups and are thus invalid for those groups. *See also Larry P.*, 343 F.Supp. at 1308, 1310, 1313.[17]

There are three major grounds for challenging a test's validity because of bias in the tests. First, many tests are standardized to white middle class norms. *Hobson*, 269 F.Supp. at 484-88, 514.[18] Second, most verbal I.Q. tests contain vocabulary items which reflect familiarity with white middle class culture, and are to that extent vocabulary tests rather than valid measures of intellectual capacity. *See Hobson*, 269 F.Supp. at 484-88; *Larry P.*, 343 F.Supp. at 1308, 1313; *Spangler*, 311 F.Supp. at 519; *Bridgeport Guardians*, 354 F.Supp. at 790.[19] Third, testing fails to measure what it purports to measure when not done in the person's primary language. *Cf. Castro*, 459 F.2d at 729.[20] This last was also cited as a reasonable justification for Congressional determination of denial of equal protection in upholding Congress' ban on English-only literacy tests (without reaching the issue, however, of judicial capacity to make such a determination). *Katzenbach*, 384 U.S. at 653-55, 86 S.Ct. at 1725-26. One successful means of demonstrating the invalidity of a test because of testing bias is to submit evidence of retesting in the primary language and/or with culturally biased items removed or reworded. *See Larry P.*, 343 F.Supp. at 1308, 1313-14.[21]

Testing and the Substantive Problems of Classification

The problem of testing bias, however, cannot be dealt with entirely in terms of test validity. It might be found, for example, that a particular test, despite its bias, was "valid" — either predictively, in that later success depends upon the same biases, or in terms of content, in that the traits measured by the test are the same traits recognized and valued by teachers or work supervisors — notably, white middle class traits.

One possible response to this dilemma is to declare that the problem then lies in the classification and selection hierarchy itself and not in the testing procedures, which sometimes only accurately reflect that hierarchy.[22] While this response is useful in reminding us of the ultimate source of many of the classification problems (i.e., that it is not simply a question of the "wrong" people being assigned to certain positions), this should not serve as a rationale for avoiding challenges to the testing procedures themselves as important links in a chain of denial of equal protection. The substantive effects of tracking, aside from providing evidence in testing cases of irreparable harm,[23] can in fact be used to rebut the justifications of testing procedures. This form of challenge can already be found in several cases involving the tendency of classification to perpetuate discrimination and segregation.

First, several cases have ruled that testing may not be used in recently desegregated school systems, irrespective of issues of test validity. *Singleton*, 419 F.2d at 1219; *Tunica County*, 421 F.2d at 1237; *Sunflower County*, 430 F.2d at 841; *Lemon*, 444 F.2d at 1401; *Lincoln County*, 301 F.Supp. at 1029; *see also Moses*, 330 F.Supp. at 1344-45. The rationale for this ban would seem to lie in the tests' tendencies to nullify the effects of the desegregation order and to base continued discrimination on the results of past discrimination. *See Lincoln County*, 301 F.Supp. at 1029. It is applicable to intra-school tracking as well as to the maintenance of dual schools. *See Moses*, 330 F.Supp. at 1341-45. The duration

of the ban has been held to be "until a unitary system is established." *Singleton*, 419 F.2d at 1219; *Tunica County*, 421 F.2d at 1237; *Sunflower County*, 430 F.2d at 841. *Lemon* interpreted "established" to mean that "at a minimum. . .the district in question must have for several years operated as a unitary system." 444 F.2d at 1401. This approach was not used in *Copeland*, however, which held, 464 F.2d at 934, that a school system under a desegregation order was not prevented *per se* from using a testing and classification procedure which resulted in two formerly black schools being turned into "special education" schools, whose student bodies, determined on the bases of test scores, continued to be predominantly black. The court instead used the general testing approach described above, remanding the case in order to allow an opportunity for showing that the tests were "relevant, reliable, and free of discrimination." (*Copeland* may be distinguishable from the other cases, however, all of which involved homogeneous ability grouping, since the decision was based in part on the alleged unique needs and benefits involved in special education for the mentally retarded and children with special learning disabilities. 464 F.2d at 933-34.) Also, *Nansemond County*, 351 F.Supp. at 206-208 held that *Singleton* was not applicable to the use of properly administered tests for purposes of teacher hiring and rehiring in a recently desegregated system in the absence of a showing of any connection between the hiring policy and the implementation of desegregation.

Second, a history of past discrimination can furnish evidence of the discriminatory use of tests. See *Moses*, 330 F. Supp. at 1345; *Baker*, 462 F.2d at 1115; *Mitchell* (valid *Congressional* justification for a ban on all literacy tests), 400 U.S. at 132, 91 S.Ct. at 268.[24]

Third, it can be claimed that even where tests are valid and measure qualities in which the testers have a legitimate interest, their use represents a denial of equal protection where the development of the qualities being measured has been affected by discriminatory state action. *See Lincoln County*, 301 F.Supp. at 1029.[25] Thus, in *Gaston County*, 395 U.S. at 296-97, 89 S.Ct. at 1726 (prior to the 1970 ban on all literacy tests), evidence of inferior education, and thus previous denial of equal educational opportunity, was cited in holding that the county, in attempting to reinstate a literacy test, had not met its burden of showing that such a test had not been used for purposes or effect of abridging the right to vote on account of race; this was cited as a similar Congressional justification for the literacy test ban in *Mitchell*, 400 U.S. at 133, 91 S.Ct. at 269.

Fourth, it is important to note that, particularly when test scores are used to justify a classification, the relationship can be turned around so that tests are used positively to demonstrate prior denial of equal protection. In *Serna*, 351 F.Supp. at 1281-82, lower I.Q. and reading test scores in the district's predominantly Spanish-surnamed school were cited in holding a denial of equal protection and ordering the expansion of bilingual and bicultural programs.[26]

Several of the other effects of classification could be used to challenge tests which seem to be "valid," particularly those whose validity rests upon a reflection of the same biases inherent in later performance standards. Thus, the self-fulfilling nature of classification procedures, their effects upon teacher expectations and students' self-images, other forms of bias in the evaluation of performance, and the inferior quality of lower-track education can be used to explain correlations between test results and later student performance, thus challenging the notion that the tests are valid. *See Moody*, 474 F.2d at 139. One graphic example, in which test results are known to the teachers responsible for the performance ratings used to validate the tests, violates the *Georgia Power* standards for the uniform testing procedures. 474 F.2d at 916; *cf. Hobson*, 269 F. Supp. at 484, 488-91, 514; *Moses*, 330 F.Supp. at 1344; *Larry P.*, 343 F.Supp. at 1312-13.[27] Further, evidence of inferior education or inadequate special compensatory education, aside from providing a basis for challenging a classification scheme directly, could also be used to demonstrate that when tests are used to channel students into such programs, they are not serving their alleged purposes of differentiating among students in order to best meet individual needs. A test generally validated for measuring reading ability, for example, is not valid "in the setting in which it is

used"[28] when the lower track does not provide adequate remedial reading programs — the test ceases to bear a manifest relationship to the categories among which it differentiates. Finally, the locking-in effect of classification requires, at a minimum, regular reevaluation and retesting, although the lack of such procedures is clearly only one of many causes of that lock-in effect. See *Hobson*, 269 F.Supp. at 476; *Larry P.*, 343 F.Supp. at 1308.[29]

Test Administration

A test which would otherwise be valid and non-discriminatory might be found to be administered in a discriminatory manner. Failure to make the same test requirements of all similarly situated job applicants represents such discrimination, *see Baker* 462 F.2d at 1114-15, as does failure to require testing of those hired or promoted under discriminatory practices previous to the initiation of testing, *see Jacksonville Terminal*, 451 F.2d at 456; *Hicks*, 319 F.Supp. at 321. (The latter even where previous hiring was non-discriminatory, might also be claimed to represent a failure to demonstrate feasible predictive validity.) Standardized tests often are distributed with detailed instructions for non-discriminatory administration,[30] and departures from those instructions should be challenged. Finally, the use of testers who are unqualified, inexperienced, unsympathetic, or unfamiliar with a student's language or culture might be grounds for invalidation of testing procedures. *See Larry P.*, 343 F.Supp. at 1308; *cf. Hobson*, 269 F.Supp. at 514.[31]

Cases Upholding Testing Procedures

In addition to the cases mentioned above (*Copeland*, *Nansemond County*, and *Davis*), there have been some rulings against some aspects of challenges to testing. Thus, *Murray*, 472 F.2d at 444, rejected a challenge by black students to the use of psychological testing, simply declaring that the plaintiffs had submitted no evidence to show any discriminatory intent or effect. *Nansemond County*, 351 F.Supp at 205-208, found that the school board had met its burden of demonstrating validity in its use of the National Teachers Examination through expert advice, information gathering, and proper administration. *Douglas* v. *Hampton*, 338 F.Supp. at 20-22, in denying a motion for a preliminary injunction against the use of the Federal Service Entrance Examination and remanding to the Civil Service Commission for a determination of possible discriminatory effect and sufficient relation to job performance, stated that plaintiffs had made no showing of statistical racially discriminatory impact and that defendants had, through expert job analysis, demonstrated a reasonable measure of job-relatedness. *Davis* found that the police tests used for hiring, 348 F.Supp. at 16-18, and promotion, 352 F.Supp. at 189-92, met that burden, pointing to active minority recruitment programs, careful test construction without cultural bias, yearly test revision, questions based on actual experience, and procedures for challenging individual questions on the promotion test.[32] *Cooper*, while finding for plaintiff in holding that the use of an Otis I.Q. test in hiring municipal golf pros had a discriminatory effect and was not substantially job-related, also stated; 467 F.2d at 839, that there is no duty to validate tests until after a discriminatory impact has been shown. Lastly, *Allen*, 331 F.Supp. at 1146-47, held that a police-applicant examination bore a rational relationship to job requirements and that a small police department cannot be expected to conduct detailed test studies. (But see J. Goldberg's dissent from the brief affirming opinion, claiming that the lower court had misinterpreted *Griggs* and that the burden is one of demonstrating "substantial" showing of job-relatedness, and not that the test is merely "rationally related." 466 F.2d at 126-27.)

Footnotes

[1] See "Common Practices in the Use of Tests for Grouping Students in Public Schools," in Warren G. Findley and Miriam M. Bryan, *Ability Grouping: 1970, Status, Impact, and Alternatives*, Center for Educational Improvement, University of Georgia, Athens, Georgia 30601, pages 5-19.

[2] Also, alleged in *Stewart* (pending), *Simpkins* (pending), and *Arellano* (pending). For a general discussion of some of the problems involved in basing equal protection arguments on wealth classifications, see Merle McClung, "School Classification: Some Legal Approaches to Labels," 14 *Inequality in Education* 17,25.

[7] For the Supreme Court's most recent treatment of sex classifications, see *Frontiero* v. *Richardson*, 93 S.Ct. 1764 (1973), in which four Justices held sex to be an inherently suspect classification, with four justices concurring in the decision without reaching that issue.

[8] Should a school district claim that testing is not the predominant factor in classification, because of the use of other standards or parental consent, and that the statistical disparity in the categories is thus not a product of the testing, see the courts' rejection of such arguments in *Hobson*, 269 F.Supp. at 475, and *Larry P.*, 343 F.Supp. at 1311-13.

[9] For a good discussion of the rationale for requiring such a shift of burden, and its applicability to testing cases, see *Larry P.*, 343 F.Supp. at 1308-11.

[10] For a general discussion of equal protection analysis and school classification, see McClung, *supra*, at 24-30.

[11] This also means, however, that judicial reluctance to broaden "suspect classification" need not necessarily be seen as a bar to this shifting-of-burden treatment; note the general absence of the use of the term in these cases.

[12] Independently, the court also found discriminatory "purpose" in the school district's use of the National Teachers Examination for employment, as evidenced by the district's previous discrimination, and its knowledge, from previous testing, of the discriminatory impact of the tests.

[13] Also, alleged in *Morgan, Massachusetts Commission Against Discrimination* (pending), and *Stewart* (pending).

[14] See E. Richard Larson, *Employment Discrimination in State and Local Government*, 7 Clearinghouse Review 63 (June, 1973).

[15] See also George Cooper and Richard B. Sobol, *Seniority and Testing under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 Harv. L. Rev. 1598 (1969).

[16] I.e., that the probability of obtaining the same test results through mere chance is no greater than one-in-twenty.

[17] For a brief discussion, see *Chance*, 330 F.Supp. at 216.

[18] See *Georgia Power*, 474 F.2d at 912.

[19] See also the stipulation agreement in *Guadalupe*, and the Affidavit in *Larry P.*

[20] See also the stipulation agreement in *Guadalupe* and the Affidavit in *Larry P.* Also, alleged in *Stewart* (pending).

[21] Also, alleged in *Stewart* (pending), *Covarrubias* (pending), and *Arellano* (pending).

[22] See also the stipulation agreement in *Diana*. Also, alleged in *Ruiz* (pending) and *Arellano* (pending).

[23] See also the stipulation agreement in *Diana*. Also alleged in *Ruiz* (pending) and *Arellano* (pending).

[24] See also the stipulation agreements in *Diana*, and *Guadalupe*. Also, alleged in *Ruiz* (pending) and *Arellano* (pending).

[25] Similar evidence submitted in *Diana* and *Covarrubias* (pending). See also, "Cultural Bias in Tests," Findley and Bryan, *supra*, at 60-61.

[26] See the material on substantive challenges in McClung, *supra*, at 24-31. See also Findley and Bryan, *supra*, at 79-80.

[27] See *Larry P.*, 343 F.Supp. at 1308; *Hobson*, 269 F.Supp. at 484, 488-92, 511-15; *Moses*, 330 F.Supp. at 1343-45.

[28] Also, alleged in *Simpkins* (pending).

[29] See also the memorandum in *Moses*. Similar allegations made in *Moses*, *Stewart* (pending), and *Simpkins* (pending).

[30] In *Keyes* v. *School District No. 1, Denver Colorado*, 313 F.Supp. 61, 78-79, 82-83, (D.Colo. 1970) the District Court cited evidence of lower achievement test scores as one of the factors in its finding that children in *de facto* segregated schools were being denied equal educational opportunity, thus requiring integration. The Court of Appeals reversed that portion of the decision, finding that those factors did not require desegregation. 445 F.2d 990, 1003-04 (10th Cir. 1971). The Supreme Court has modified and remanded the decision because of its finding that the Court of Appeals and the District Court used an incorrect standard in finding that the city's core schools were not segregated *de jure*; it thus did not address the issue of denial of equal educational opportunity and the test results. 93 S.Ct. 2686 (1973).

[31] Allegations of the self-fulfilling nature of classifications based on test scores also made in *Ruiz* (pending) and *Arellano* (pending).

[32] *Georgia Power*, 474 F.2d at 912.

[33] See also the stipulation agreement in *Diana*. Also alleged in *Stewart* (pending).

[34] See "Publishers' Test Information" in Findley and Bryan, *supra*, at 61-69.

[35] Also, alleged in *Ruiz* (pending) and *Stewart* (pending). See also the complaint in *Larry P.*

[36] *Bridgeport Guardians* took notice of *Davis*, stating that *Davis* does not put in question the standards by which other cases have struck down testing procedures, but rather that *Davis* is one case in which the burden of persuasively demonstrating actual job-relatedness was met.

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* Portions of the pleadings and other materials appear in the Center's publication *Classification Materials, Revised 1973.*

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